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No. 00-

IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY, and THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, individually and as Executor of the Estate of his deceased father, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 19, 2001

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QUESTIONS PRESENTED

1. Whether the Second Circuit improperly deviated from this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and from the reasoning of other circuit courts, when it reversed the District Court's *forum non conveniens* dismissal of this action on the ground that claims for violations of international law brought pursuant to the Alien Tort Statute are "our business", because of a special "policy favoring receptivity" of such claims, and not subject to dismissal even in favor of a concededly adequate forum in England.

2. Whether, in connection with a *forum non conveniens* analysis under *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the choice of a forum by a plaintiff who resides in the United States but outside the forum state is entitled to a strong "home forum" presumption, as the Second Circuit held, or whether that choice is entitled to less deference, as the Ninth Circuit has held.

3. Whether general personal jurisdiction may be asserted over foreign corporations whose only contacts with the United States consist of activities directed at cultivating relations with investors in the corporations' publicly traded securities, as the Second Circuit held, or whether such contacts are insufficient to support the assertion of general jurisdiction over foreign corporations, as the holdings of numerous other circuit courts and state courts indicate.

4. Whether the Second Circuit improperly deviated from holdings of this Court, including *New York Life Insurance Co. v. Hendren*, 92 U.S. 286 (1875), *Ker v. Illinois*, 119 U.S. 436 (1886), and *Huntington v. Attrill*, 146 U.S. 657 (1892), when it concluded that claimed violations of the norms of international law arise under the laws of the United States within the meaning of Article III of the United States Constitution and thus provide an independent basis for the exercise of federal court subject-matter jurisdiction over an action.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The petitioners are Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c., who were defendants-appellees-cross-appellants below and shall be referred to as "petitioners" or "defendants" throughout this petition. Neither petitioner has any corporate parents and no public company owns 10% or more of either of the companies' stock.

The respondents are Ken Wiwa, individually and as Executor of the Estate of his deceased father, Ken Saro-Wiwa, Owens Wiwa, Blessing Kpuinen, individually and as Administratrix of the Estate of her husband, John Kpuinen, and Jane Doe, who were plaintiffs-appellants-cross-appellees below and shall be referred to as "respondents" or "plaintiffs" throughout this petition.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Royal Dutch Petroleum Company ("Royal Dutch") and The "Shell" Transport and Trading Company, p.l.c. ("Shell Transport"), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on September 14, 2000.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 226 F.3d 88 (2d Cir. 2000) and annexed hereto as Appendix A. This decision affirmed in part and reversed in part the order of

the United States District Court for the Southern District of New York entered on September 25, 1998, as amended by the order entered on January 20, 1999, dismissing plaintiffs' Amended Complaint on the ground of *forum non conveniens*. The District Court's orders and opinions are not reported and are annexed hereto as Appendices B and C. The District Court's order of September 25, 1998, adopted in part and rejected in part the Report and Recommendation of the Magistrate Judge submitted on March 31, 1998 ("Report"). The Report is annexed hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 14, 2000. Petitioners' timely petition to the Court of Appeals for rehearing and rehearing *en banc* was denied on October 25, 2000; that order is annexed hereto as Appendix E. This petition is timely filed within ninety days of the denial of the petition for rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

Article III, Section 2, of the United States Constitution, which states in relevant part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."

The Alien Tort Statute (also referred to as the Alien Tort Claims Act), 28 U.S.C. § 1350 (1994), which states in full:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in

violation of the law of nations or a treaty of the United States."

The Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 (1994), the text of which is set forth at Appendix F.

STATEMENT OF THE CASE

The plaintiffs in this case are aliens who resided in Nigeria at the time of the acts giving rise to this lawsuit; none resided in New York, the forum state, when the lawsuit was filed. The defendants, petitioners here, are a Dutch corporation and an English corporation; neither conducts or solicits business in the United States. The gravamen of the Amended Complaint is the allegation that plaintiffs (and their next of kin) were victims of human rights abuses perpetrated against them in Nigeria by the Nigerian government in retaliation for their protests (in Nigeria) against the oil exploration activities of a Nigerian company indirectly owned by petitioners.

This case does not belong in the courts of the United States. The federal courts lack subject-matter jurisdiction over the action because the parties are not diverse and the claims do not arise under federal law. The assertion of personal jurisdiction over petitioners violates the Due Process Clause of the Constitution. And neither the parties nor the claims have a sufficient connection to New York (or to the United States) to justify the District Court's retention of jurisdiction. The District Court recognized as much when it exercised its discretion to dismiss the case on *forum non conveniens* grounds in favor of a trial in England, an undisputably adequate alternative forum with a greater interest in this litigation.

However, the Second Circuit reversed. In doing so, it distorted and ignored settled law (and created or contributed to conflicts among the circuits) in three areas—*forum non conveniens*, personal jurisdiction and subject-matter

jurisdiction—in order to ensure that this lawsuit, and others like it, would be tried in federal court in New York. The Second Circuit has vastly expanded the role of the federal district courts, converting them into *de facto* International Courts of Justice with universal jurisdiction to apply international law to disputes arising out of alleged human rights abuses committed abroad against foreign nationals by their governments. Under the Second Circuit's ruling, virtually any multinational corporation with a listing on a United States stock exchange (not to mention numerous foreign officials, *see infra* note 3) will be at risk of being haled into court in New York to answer for acts having no connection to the United States and not violating any federal law; and, once filed, such lawsuits must be tried in New York, even if a more appropriate adequate forum exists.

The federal courts have already seen an explosion of international law litigation with highly attenuated connections to the United States, *see infra* note 3, and the Second Circuit's decision, if left undisturbed, will only exacerbate that trend. This opening of the federal courts to a large class of jurisdictionally questionable lawsuits, and the attendant foreign policy consequences of such an opening (including the risk of reciprocal action against U.S. entities in foreign courts), *see, e.g.*, Elizabeth Amon, *Coming to America: The Alien Tort Claims Act Provides a Legal Forum for the World*, Nat'l L.J., Oct. 23, 2000, at A1, A10, cries out for the immediate attention of this Court.

A. The Alien Tort Statute

Plaintiffs bring this lawsuit in federal court pursuant to the Alien Tort Statute (the "ATS"), a jurisdictional statute that was enacted as part of the Judiciary Act of 1789 and gives the district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a

treaty of the United States". 28 U.S.C. § 1350.[1] Essentially moribund for nearly two hundred years, *see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-13 & n.21 (D.C. Cir. 1984) (Bork, J., concurring), the ATS was given life by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Filartiga* held that the ATS gives the federal courts statutory jurisdiction over claimed violations of established norms of the international law of human rights, even where such norms are not codified as positive enactments of domestic federal law. 630 F.2d at 887-88.[2] In response to the argument that the federal courts lack subject-matter jurisdiction over such claims under Article III—diversity jurisdiction did not exist because all parties to the suit were aliens, *see Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303 (1809)—the Second Circuit held that uncodified international law is a part of "the common law of the United States" and that claims for its violation therefore "aris[e] under . . . the Laws of the United States" within the meaning of Article III. 630 F.2d at 885-87.

Filartiga has recently led to a flood of cases in which an

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[1] The ATS originally provided that the federal district courts "shall also have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States". Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. It is clear from its placement in the Judiciary Act and from the plain meaning of both the original language and the current text that the ATS is a jurisdictional statute that does not create any substantive rights. Such a "pure jurisdictional statute" is not an independent source of Article III "arising under" jurisdiction. *Mesa v. California*, 489 U.S. 121, 136 (1989).

[2] When Congress, pursuant to its power to "define and punish . . . Offences against the Law of Nations", U.S. Const., art. I, § 8, cl. 10, codifies a norm of international law in a federal statute, that norm takes on a separate existence as a law of the United States, which raises none of the Article III concerns set forth herein. Plaintiffs' claims are based on norms of customary international law that have not been enacted into federal statutory law. According to *Filartiga*, the sources from which such norms are derived include the works of jurists and commentators, the practice of nations, international conventions and judicial decisions. 630 F.2d at 880-81.

alien plaintiff sues an alien defendant (either a governmental entity or a private party alleged to have cooperated with a governmental entity) in federal court for alleged human rights abuses occurring abroad, premising statutory jurisdiction on the ATS and constitutional jurisdiction on the holding of *Filartiga*.[3] This is one such case.

B. The Parties and Allegations

Shell Transport is an English holding company incorporated and headquartered in England with its only place of business in London. Royal Dutch is a Dutch holding company incorporated and headquartered in The Netherlands with its only place of business in The Hague. Shell Transport and Royal Dutch are investment vehicles that engage in no operational activities. (App. D-2 n.1, D-5.) They together own, directly or indirectly, investments in various companies located throughout the world, and derive the whole of their income, except for interest income on cash flow balances or short term investments, from their investments in these companies. (App. D-2, D-5.) One of these companies is The Shell Petroleum Development Company of Nigeria, Ltd.

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[3] A number of such actions were filed in the latter part of 2000, including a suit against the former premier of China, challenging the Chinese government's actions during the 1989 Tiananmen Square protests, *see* Complaint, *Feng v. Li*, No. 00-CV-6446 (S.D.N.Y. filed Aug. 28, 2000); a suit against Zimbabwe's president, alleging human rights abuses surrounding his country's recent elections, *see* Complaint, *Tachiona v. Mugabe*, No. 00-CV-6666 (S.D.N.Y. filed Sept. 6, 2000); a suit against Rio Tinto, a London-based mining company, alleging environmental and human rights violations in Papua New Guinea, *see* Complaint, *Tamuasi v. Rio Tinto, plc*, No. 00-CV-3208 (N.D. Cal. filed Sept. 6, 2000); and a class action against the Japanese government alleging that class members were raped and abused by Japanese soldiers during World War II, *see Hwang Guem Joo v. Japan*, No. 00-CV-2233 (D.D.C. filed Sept. 18, 2000). (Copies of the cited complaints have been lodged with the Clerk of the Court.) In recent years, actions for, among other things, war crimes in Bosnia, *see, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and slavery in Burma, *see, e.g.*, *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), have also been brought.

("Shell Nigeria"), a Nigerian corporation that is not a party to this action.

Plaintiffs are Ken Wiwa, a citizen and resident of Great Britain, who sues individually and as executor of the estate of his deceased father, Ken Saro-Wiwa, who was a citizen and resident of Nigeria; Owens Wiwa, a citizen of Nigeria and resident of Canada; Blessing Kpuinen, a citizen of Nigeria and resident of the United States (but not of New York), who sues individually and as administratrix of the estate of her deceased husband John Kpuinen ("Kpuinen"), who was a citizen and resident of Nigeria; and Jane Doe, a citizen of Nigeria who resides outside the United States. (App. G ¶¶ 7-10.)

Plaintiffs' allegations focus on the actions of the Nigerian government in 1994 and 1995. Plaintiffs allege that in May 1994, Saro-Wiwa and Kpuinen were arrested and detained by the "Nigerian military" and were tortured while in Nigerian prison; that in November 1994, the "Nigerian military regime" created a "special tribunal" that tried Saro-Wiwa and Kpuinen and condemned them to death; that in November 1995, Saro-Wiwa and Kpuinen were executed by the "Nigerian military junta"; that Owens Wiwa was arrested, detained and forced to flee Nigeria; and that these actions violated international law. (App. G ¶¶ 1-2, 66-67, 69, 72, 74, 77, 81-84, 102, 111, 118.)[4] Plaintiffs further allege that these actions were taken by the Nigerian government at the instigation of, and with the cooperation and support of, petitioners and/or Shell Nigeria, in

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[4] According to plaintiffs, these alleged violations of international law state claims under Nigerian law, New York law, "Customary international law", the "Common law of the United States of America", the ATS, five international agreements (three of which are U.S. treaties) and the federal RICO statute. (App. G ¶ 98.) The first two of these obviously do not give rise to federal question jurisdiction. The next three are simply different ways of referring to the claims recognized by *Filartiga*, and are discussed in detail in Section III below. The remainder do not support jurisdiction because plaintiffs have no standing to invoke the treaties and RICO does not apply to the Nigerian conduct alleged here. *See infra* note 19.

reprisal for protest activities directed against Shell Nigeria's oil exploration activities in Nigeria. (App. G ¶ 20.)

C. The District Court's Decision

Following jurisdictional discovery, petitioners moved to dismiss the Amended Complaint. On March 31, 1998, the Magistrate Judge submitted the Report, in which he recommended that petitioners' motion be granted based on both lack of personal jurisdiction and the doctrine of *forum non conveniens*. With respect to the former, the Magistrate Judge applied Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure and determined that petitioners lacked sufficient contacts with New York to satisfy the "doing business" requirement of New York's long-arm statute, N.Y. C.P.L.R. 313 (McKinney 2000). (App. D-8 to D-17.)[5] The Magistrate Judge also concluded that petitioners "do not have sufficient minimum contacts with the United States overall to permit the assertion of general jurisdiction" under Rule 4(k)(2) of the Federal Rules of Civil Procedure and the Due Process Clause of the Constitution, as interpreted in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). He explained:

> "Apart from the sporadic visits of their officers and employees to the United States to participate in investor relations meetings and the trading of their stock on the New York Stock Exchange, defendants have no direct contacts with the United States whatsoever. . . . Attributing the actions of [the Shell Oil employee] to

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[5] Petitioners engage in no operational activities in the United States. (App. D-5.) Shares of Royal Dutch and American Depository Receipts representing shares of Shell Transport are listed on the New York Stock Exchange. (App. D-6.) In connection with these publicly traded securities, there is a worldwide investor relations program developed in London and The Hague. Related services, such as the dissemination of information to investors, are provided in the United States by an investor relations office in New York run by an employee of Shell Oil Company ("Shell Oil"), a Delaware corporation indirectly owned by petitioners. (App. D-6.)

> defendants does not change the result. . . . [The employee's] activities did not generate either income or capital for defendants. Thus, his activities had less impact on defendants than that of a salesperson. Since the presence of even a substantial sales force within a state is insufficient to constitute the minimum contacts necessary to sustain general jurisdiction, it logically follows that the presence of a single investor relations agent must also be insufficient." (App. D-23.)

Turning to *forum non conveniens*, the Magistrate Judge performed the two-step analysis mandated by *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), first determining that England was an adequate alternative forum for the litigation because plaintiffs' claims are actionable in England as common law torts and the English courts are neutral and just fora (App. D-29 to D-33), and then performing the balancing test required by *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Following a thorough analysis (App. D-33 to D-38), the Magistrate Judge concluded that "all the public and private interest factors are either neutral or favor England" (App. D-38).

Upon plaintiffs' objections to the Report, the District Court dismissed the action. The District Court concluded that it had personal jurisdiction over petitioners based solely upon the investor relations activities of Shell Oil in New York. (App. B-5 to B-8.) However, the District Court accepted the Report's conclusions that England was an adequate alternative forum for this case and that the balance of private and public interest factors favored trial in England. The District Court explained:

> "[T]he Report correctly weighs the private interest factors in reaching its conclusion that England would be a better forum for this litigation. The bulk of the documents necessary for litigation are in England . . . . Equally important, plaintiffs do not allege that any of their witnesses or defendants' witnesses are present in this jurisdiction. It seems that only two plaintiffs reside in the

> United States, neither in New York. . . . Surprisingly, plaintiffs' attorney commented at oral argument before the Magistrate Judge that, '[I]t is true that in some sense the choice of New York over some other jurisdiction within the United States is not particularly relevant. I mean, we can't say that New York has a closer connection to the events in Nigeria then, let's say, a court in the Third Circuit.' Thus private interest factors weigh against plaintiffs' current choice of forum.
>
> "[P]ublic interest factors strongly advise against trial in this district. . . . [N]one of the parties to this action is a citizen of the United States, there is no allegation that defendants' actions had an effect on the United States, and the conduct at issue was engaged in by an English corporation, in a nation formerly part of the Commonwealth of Nations, under a liability standard determined by English law." (App. B-10 to B-11 (internal citations omitted).)

Plaintiffs moved for reconsideration, which the District Court denied, except to the extent that the District Court imposed on petitioners conditions to which they had already consented. (App. C-5.) The District Court rejected plaintiffs' argument that the *forum non conveniens* inquiry should be conducted differently because this action was brought pursuant to the ATS. (App. C-5.)

D. The Court of Appeals' Decision

The Court of Appeals affirmed the District Court's holding on personal jurisdiction, but reversed its *forum non conveniens* dismissal. With respect to personal jurisdiction, the Court of Appeals concluded that Shell Oil was petitioners' "agent" for jurisdictional purposes. (App. A-10 to A-12.) The Court of Appeals recognized that this agent "was not directly involved with the core functions of the defendant[s'] business—the operation of an integrated international oil business". (App. A-11.) Nevertheless, the Court of Appeals held that

petitioners' listings on the New York Stock Exchange, coupled with the presence in New York of an agent (whose duties were "cultivating [petitioners'] relationship with the New York capital markets" (App. A-14) by "fielding inquiries from investors and potential investors", "mailing information about [petitioners] to thousands of individuals and entities throughout the United States", and "organizing meetings between officials of [petitioners] and investors, potential investors, and financial analysts" (App. A-6)) constitute "doing business" under the New York long-arm statute and continuous and systematic general business contacts under *Helicopteros* (App. A-14). The Second Circuit also held that the assertion of jurisdiction comports with traditional notions of fair play and substantial justice. (App. A-16 to A-17.)

With respect to *forum non conveniens*, the Court of Appeals accepted the District Court's conclusion that England was an adequate alternative forum for this litigation. (App. A-20.) However, the Court of Appeals reversed the District Court's balancing of the *Gilbert* factors. Recognizing that the standard of review of a *Gilbert* analysis was ordinarily for abuse of discretion, *see Piper*, 454 U.S. at 257, the Court of Appeals justified *de novo* review by asserting that the District Court had made two errors of law. (App. A-30.) One of these "errors" was the District Court's "fail[ure] to count in favor of retention the interest of the United States, as expressed in the TVPA"—a statute not at issue in this case—"in providing a forum for the adjudication of claims of torture in violation of the standards of international law" (App. A-31),[6] especially given that courts of other nations are "often inhospitable" to

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[6] According to the Court of Appeals, the TVPA

"convey[s] the message that torture committed under color of law of a foreign nation in violation of international law is 'our business' .... If in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the [ATS] only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations". (App. A-30.)

such claims (App. A-29). The other "error" was the District Court's alleged "fail[ure] to count in favor of retention that two of the plaintiffs were residents of the United States". (App. A-31.)[7] The Court of Appeals then concluded that the policy expressed in the TVPA and the United States residence of two of the plaintiffs outweighed the considerations favoring trial in England, which the Court of Appeals, contrary to the conclusions of the District Court, thought to be "minimal". (App. A-31 to A-32.)

Following the Court of Appeals' decision, petitioners sought rehearing and rehearing *en banc*. Petitioners argued, as they do here, that the Court of Appeals had departed from Supreme Court precedent in connection with its rulings on personal jurisdiction and *forum non conveniens*. In addition, petitioners requested that the Second Circuit rehear the case *en banc* to reconsider its ruling in *Filartiga* that claimed violations of uncodified international law provide an independent basis for Article III subject-matter jurisdiction over an action between aliens.[8] The Second Circuit denied the petition for rehearing and rehearing *en banc* on October 25, 2000.

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[7] The Court of Appeals was referring to Blessing Kpuinen and Owens Wiwa. However, Wiwa was a resident of Canada at the time the lawsuit was filed. (App. G ¶ 8.) The Second Circuit's statement to the contrary (App. A-7) appears to be premised upon a misreading of the District Court's finding that Wiwa was a resident of the United States while petitioners' motion to dismiss was pending (App. B-10). In any event, it is undisputed that Wiwa is not now a resident of the United States (App. A-7 n.3) and was not at any relevant time a resident of New York, and that Blessing Kpuinen is alleged to be a resident of the United States but not of New York.

[8] Petitioners did not raise their nonwaivable subject-matter jurisdiction argument prior to their petition for rehearing *en banc* because doing so would have been futile, as *Filartiga* was binding on both the District Court and the panel. *See Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995). Accordingly, this Court's consideration of the argument at this time is appropriate, especially because *Filartiga* will otherwise require the exercise of subject-matter jurisdiction over the action on remand, notwithstanding the fact that plaintiffs plead no other colorable federal claims, *see infra* note 19.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to correct the Second Circuit's unwarranted expansion of the power and obligation of the federal courts to entertain disputes between aliens that are based on alleged violations of customary international law occurring abroad. The Second Circuit's conclusion that such disputes are and must remain "our business" represents a view of United States courts that is steeped in cultural and judicial imperialism: cases such as these are to be heard here, no matter how little they, or the parties, have to do with the United States, and no matter if there is a more appropriate adequate forum in which they can be tried.

The Second Circuit's decision is inconsistent with settled law in three areas. *First*, the Court of Appeals departed from *Piper* and created a conflict among the circuits by holding that a special "policy favoring receptivity" applies where a case involves claimed violations of customary international law and that such a case must remain "our business" even if there is a concededly adequate alternative forum, *see infra* Sec. I.A, especially where a plaintiff is a resident of the United States (but not the forum state), *see infra* Sec. I.B. *Second*, the Court of Appeals departed from *Helicopteros* and created a conflict in principle with numerous circuit and state courts when it held that the Due Process Clause permits the assertion of general jurisdiction over foreign corporations based on the investor relations activities of their agent. *See infra* Sec. II. *Third*, the Second Circuit's holding in *Filartiga*, that claimed violations of customary international law present a federal question giving rise to Article III subject-matter jurisdiction, conflicts with long-standing precedent of this Court and invests the federal courts with a form of common-lawmaking authority discredited almost a century ago. *See infra* Sec. III.

I. The Court should correct the Second Circuit's departure from *Piper* and evisceration of the *forum non conveniens* doctrine.

Piper establishes a two-step analysis by which a federal court is to address a motion to dismiss for *forum non conveniens*. The court should, "[a]t the outset of" its inquiry, "determine whether there exists an [adequate] alternative forum". *Piper*, 454 U.S. at 254 n.22. If such a forum does exist, the court should consider the public and private interest factors identified in *Gilbert* and determine whether they point to trial in the foreign forum with sufficient force to overcome the presumption in favor of the plaintiff's choice of forum. *Id.* at 255-60.[9] A trial court's determination that a suit should be dismissed "may be reversed only when there has been a clear abuse of discretion". *Id.* at 257.

Wanting to provide a United States forum for aliens suing for human rights abuses committed abroad, the Second Circuit conflated and misapplied the separate steps of the *Piper* analysis (and departed from the holdings and reasoning of other circuit courts) in order to justify its reversal of a carefully reasoned decision by the District Court to dismiss this case in favor of a trial in England. In effect standing the doctrine of *forum non conveniens* on its head, the Second Circuit created a special "policy favoring receptivity" of a class of lawsuits brought by alien plaintiffs (such that those lawsuits must remain "our business"), and eliminated the idea that it matters whether a plaintiff resides in the forum state. The result of the Second Circuit's decision is to render the doctrine of *forum non conveniens* a virtual nullity in cases involving alleged international human rights abuses, at least where a single plaintiff has established residence somewhere in the United States when the suit is filed.

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[9] "[A] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum", while "a foreign plaintiff's choice deserves less deference". *Piper*, 454 U.S. at 255-56.

A. The Second Circuit departed from *Piper* and the reasoning of other circuit courts in creating a federal policy against *forum non conveniens* dismissals in international law cases.

The Second Circuit, citing the TVPA, overturned a *forum non conveniens* dismissal on the grounds that "the present law, in addition to merely permitting the U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits". (App. A-28.) This restriction of the District Court's "inherent power to dismiss on grounds of *forum non conveniens*", *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir. 1993), directly conflicts with the Ninth Circuit's position that "the doctrine of forum non conveniens [is] available in [ATS] cases *as in any other*". *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) (emphasis added). The Second Circuit's decision also conflicts in principle with the approach taken by other circuit courts, which hold that a "court must ascertain if there is anything about the specific federal statute which indicates that Congress implicitly spoke to, and rejected, the application of *forum non conveniens* doctrine to a suit thereunder". *Creative Tech., Ltd. v. Aztech Sys. Pte, Ltd.*, 61 F.3d 696, 700 (9th Cir. 1995) (internal quotation marks omitted); *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983); *accord Baumgart*, 981 F.2d at 829-34; *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 948-50 (1st Cir. 1991) (Breyer, J.).

Had the Second Circuit applied the same reasoning to the TVPA that the other circuits have applied to federal statutes such as the securities laws and RICO, it would have concluded that there is no indication that Congress sought to limit the application of the doctrine of *forum non conveniens* in international human rights abuse cases. To the contrary, the TVPA contains a textually demonstrable commitment to allowing such cases to be litigated elsewhere. The statute requires a plaintiff to exhaust "adequate and available remedies

in the place in which the conduct giving rise to the claim occurred", TVPA § 2(b), in order to "avoid exposing U.S. courts to unnecessary burdens", H.R. Rep. No. 102-367 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88. This exhaustion requirement, like the *forum non conveniens* doctrine itself, recognizes the well-settled principle that although a case may be "our business", it need not remain in federal court if it can and should be resolved elsewhere.[10]

By contrast, the Second Circuit's novel premise—that the mere existence of a federal cause of action counts against a *forum non conveniens* dismissal in a district court's *Gilbert* analysis—is specious. Whenever an action arises under federal law (or even when a federal court has jurisdiction over a transitory claim), there is, in some sense, a "policy favoring receptivity by our courts" to such suits. Without such "receptivity", there could not be a lawsuit in the United States. Consequently, unless Congress has specifically preempted the doctrine of *forum non conveniens* (as explained above), the existence of a federal cause of action affects the *forum non conveniens* analysis only if the plaintiff's rights cannot be vindicated in the proposed alternative forum, *i.e.*, if the alternative forum does not permit "litigation of the subject matter of the dispute". *Piper*, 454 U.S. at 254 n.22; *accord Creative Tech. Ltd.*, 61 F.3d at 701-03; *Kempe v. Ocean*

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[10] Plaintiffs have not even alleged any TVPA claims in their Amended Complaint. It defies common sense (as well as the maxim *expressio unius est exclusio alterius*) to conclude, as the Second Circuit did, that Congress's creation in the TVPA of a cause of action to remedy a limited and specific type of human rights abuse demonstrates a policy favoring receptivity of a broad class of ATS claims falling outside the scope of the TVPA. Moreover, the Second Circuit's observation that the TVPA "expressly ratified" the holding of *Filartiga* (*see* App. A-26) cannot be squared with the TVPA. The TVPA creates two narrowly and concretely defined causes of action and includes an exhaustion requirement and a statute of limitations. (App. F-1.) It thus bears no resemblance to the open-ended and standardless common-lawmaking approach to human rights litigation authorized by *Filartiga* and urged by plaintiffs in this case. *See infra* Sec. III.

Drilling & Exploration Co., 876 F.2d 1138, 1145 (5th Cir. 1989). Significantly, whether the plaintiff's rights can be vindicated in the alternative forum is part of the "adequacy of the alternative forum" inquiry, which, as noted above, is separate from the *Gilbert* balancing and should be performed "[a]t the outset of" a court's *forum non conveniens* analysis. *Piper*, 454 U.S. at 254 n.22; *accord Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1094 (9th Cir. 1998) (rejecting as "without merit" the plaintiffs' contention that applicability of United States law weighs in favor of domestic forum in balancing of *Gilbert* factors).

That the Second Circuit conflated the two steps of the *Piper* analysis is evident from its discussion of plaintiffs' claims. In justifying its reliance on the TVPA, and under the guise of evaluating "the difficulties that confront victims of torture . . . [in] bringing suits to vindicate such abuses" (App. A-29), the Court of Appeals simply enunciated the factors that determine whether there is an adequate forum elsewhere. The Court of Appeals explained:

> "It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as 'not our business.'" (App. A-29 to A-30.)

However, under *Piper*, it does not matter how the courts of unspecified other nations "often" regard suits like this one; what is relevant is whether an English court will regard *this* case as its business. The District Court considered every one of these "difficulties" in concluding that England would be an

adequate forum for this case. (App. D-29 to D-33.) The Court of Appeals did not disturb that conclusion, nor could it have, given its prior observation that the claims recognized in *Filartiga* had their origins in centuries-old English common law. *See Filartiga*, 630 F.2d at 886. (*See also* App. D-29 to D-31 (discussing "unique relationship" between American and British legal systems).)

Accordingly, even if the Second Circuit were correct in saying that suits involving international human rights abuses are "our business" and that United States courts had a "policy favoring receptivity" of such suits, *but see infra* Sec. III, the Second Circuit was wrong to hold that such suits cannot be dismissed. The whole point of the doctrine of *forum non conveniens* is that cases that are "our business" are not exclusively so, and that it is sometimes more appropriate to litigate such cases elsewhere. Proper application of *Piper* and the "adequate alternative forum" test, not the Second Circuit's special "policy favoring receptivity", will ensure that a case will not be dismissed in favor of an "inhospitable" forum.

B. The Second Circuit's decision to give heightened deference to the forum choice of a plaintiff who resides in the United States but outside the forum state creates a conflict among the circuits.

The Second Circuit held in this case (App. A-23) that the choice of forum by a plaintiff who is a resident of the United States, but not of the forum state, is entitled to the heightened deference that *Piper* reserves for plaintiffs suing in their "home forum", *see supra* note 9. *See also Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000) (giving heightened deference to forum choice of U.S. citizen who resides outside the forum state). In other words, the Second Circuit has adopted the rule that, in connection with a court's *Gilbert* balancing, the "home forum" of a United States citizen or resident "for *forum non conveniens* purposes is *any* United States court". *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49, 62

(2d Cir. 2000) (emphasis added) (internal quotation marks omitted); *see also id.* at 63 n.2 (emphasizing that rule is generally applicable and that "*Guidi* and *Wiwa* are not limited to their facts").

The Second Circuit's rule not only makes it virtually impossible for a suit brought by a United States resident to be dismissed on *forum non conveniens* grounds, but also conflicts with the rule in the Ninth Circuit, which gives heightened deference to a plaintiff's choice of forum only where the plaintiff is a citizen or resident of the forum state. *See Gemini Capital Group*, 150 F.3d at 1090-91.[11] Judge Cabranes, dissenting from the application of the Second Circuit's rule in *DiRienzo*, recognized this conflict and cited *Gemini Capital Group*, *see DiRienzo*, 232 F.3d at 78 (Cabranes, J., dissenting), in support of the argument that the Second Circuit's rule is an "inventive, and surprising, proposition", *id.* at 75, that is outside "the mainstream of forum non conveniens law", *id.* at 76. Judge Cabranes is correct; the Second Circuit's rule is completely at odds with the rationale underlying the "home forum" presumption. As this Court explained in *Piper*, a plaintiff's decision to sue in his state of residence is afforded

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[11] *Gemini Capital Group* involved a suit filed in the District of Hawaii by two California corporations and other plaintiffs, "none of [whom] are Hawaii residents". The district court dismissed the suit on *forum non conveniens* grounds, "according [plaintiffs'] choice of Hawaii as a forum less deference than that accorded a Hawaii resident suing in his home forum". *Id.* at 1091. Plaintiffs argued on appeal that their forum choice should have received heightened deference. The Ninth Circuit disagreed and affirmed the district court's dismissal, explaining that "the presumption of convenience accorded plaintiffs suing in their home fora . . . does not apply here" because the United States plaintiffs were not Hawaii residents. *Id.* The Seventh Circuit has also addressed this issue, adopting yet a third approach. *See Macedo v. Boeing Co.*, 693 F.2d 683, 688 (7th Cir. 1982) (holding that "Northern District of Illinois is not the 'home forum' for" United States residents who were not residents of Illinois, although granting "considerable deference" to plaintiffs' choice because that court "may well be the closest available forum").

heightened deference because "it is reasonable to assume" that the local forum is convenient for the plaintiff. *Piper*, 454 U.S. at 255-56. Where a plaintiff has chosen to file suit in a foreign or remote forum—New York, for example, when the plaintiff resides in California—"this assumption is much less reasonable". *Id.* at 256. The assumption is even less reasonable where, as here, only one of several plaintiffs was a resident of the United States, *see supra* note 7, while another was a citizen and resident of the alternative forum (App. G ¶ 7). A presumption of convenience, therefore, cannot justify the Second Circuit's rule.[12] Rather, as Judge Cabranes suggested, this rule—as well as the Second Circuit's decision to require that a plaintiff's U.S. residence be given essentially dispositive weight in a court's balancing of the *Gilbert* factors—reflects a "chauvinistic preference for American courts and American plaintiffs above all others", which, if adopted at all, "should be articulated in the first instance by the Supreme Court". *DiRienzo*, 232 F.3d at 78-79 (Cabranes, J., dissenting).

II. The Second Circuit's holding on general personal jurisdiction conflicts in principle with the holdings of other circuit and state courts.

As part of its expansion of the power of the New York federal courts to adjudicate claimed violations of international

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[12] The Second Circuit's rule also is in tension with this Court's decision in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947). *Koster* involved a derivative action brought in federal court in New York by a citizen of New York. Affirming a *forum non conveniens* dismissal in favor of another domestic venue (Illinois), the Court enunciated an exception to the "home forum" presumption for derivative actions, explaining that "where there are hundreds of potential plaintiffs, all . . . of whom could with equal show of right go into their many home courts, the claim of any one that a forum is appropriate merely because it is his home forum is considerably weakened". 330 U.S. at 524. Significantly, the Court's reasoning assumes that the "home forum" of a United States plaintiff is the plaintiff's home state, not the United States at large. *See Koster*, 330 U.S. at 524-25.

law, the Second Circuit invented a new standard for obtaining general personal jurisdiction[13] over multinational corporations that do not conduct, or even solicit, business in the United States. As a result, a corporation can be haled into federal court to answer for acts occurring anywhere in the world, so long as the corporation is listed on a stock exchange and it or its agent performs acts in the United States to "cultivate relations with investors" (App. A-14) or "facilitat[e] . . . relations . . . with the investment community" (App. A-6). This newly minted standard is not only inconsistent with the law of personal jurisdiction as set forth by this Court and other circuit and state courts (under the Due Process Clause), but extremely broad, potentially subjecting hundreds of foreign corporations to the general jurisdiction of the federal courts of New York.[14]

According to the Court of Appeals, general jurisdiction can be asserted over petitioners because petitioners are listed on the New York Stock Exchange (the "NYSE") and their agent in New York, for the purpose of "cultivating [petitioners'] relationship with the New York capital markets", engaged in "fielding inquiries from investors and potential investors" (App. A-14), "mailing information about [petitioners] to thousands of individuals and entities throughout the United States", and "organizing meetings between officials of

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[13] "General jurisdiction" refers to the exercise of jurisdiction over a defendant in a suit, such as this one, not arising out of or related to the defendant's contacts with the forum. *Helicopteros*, 466 U.S. at 414 n.9.

[14] Assertion of jurisdiction over petitioners also violates the fairness requirement of the Due Process Clause. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987). In concluding otherwise (App. A-17), the Second Circuit did not address "the interests of the forum" or "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction", as it was required to do under *Asahi*. Presumably the Second Circuit believed that these concerns were resolved by its conclusion that claimed violations of international law are matters of domestic federal law. For reasons explained herein, they are not. *See supra* Sec. I.A; *infra* Sec. III.

[petitioners] and investors, potential investors, and financial analysts" (App. A-6). This reasoning is completely at odds with *Helicopteros*, which requires that a defendant have systematic and continuous "*general business* contacts" with the forum. *Helicopteros*, 466 U.S. at 416 (emphasis added); *accord Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952). The investor relations activities of petitioners' agent are not part of petitioners' "general business", as the Court of Appeals itself recognized when it noted that "the Investor Relations Office was not directly involved with the core functions of the defendant[s'] business—the operation of an integrated international oil business" (App. A-11). *See International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (whether due process is satisfied "depend[s] . . . upon the *quality and nature* of the activity" (emphasis added)).

The test for general jurisdiction has been described as "whether . . . defendant was doing business within the state . . . in such manner and to such extent as to warrant the inference that it was present there". *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517 (1923), *cited in Helicopteros*, 466 U.S. at 417-18. That petitioners' agent was not "doing business" within New York (or the United States) is confirmed by well-settled case law holding that a corporation's listing of securities on a stock exchange, and its in-forum activities incidental thereto, do not constitute the "doing" in the forum of the corporation's "business". *See, e.g., Sunrise Lumber Co. v. Homer D. Biery Lumber Co.*, 185 N.Y.S 711, 713 (App. Div. 1921). (*See also* App. D-11 to D-12 (citing cases).)

At most, the agent's activities, which do not include the sale of petitioners' securities (App. D-15 to D-16), might be characterized as the promotion of petitioners' stock and the solicitation of trading of that stock on the secondary markets. However, such activities are less significant than two types of activities that are more directly related to a defendant's general business but which have uniformly been deemed insufficient for general jurisdictional purposes. *First*, even the *sale* by a

corporation of its own securities (and the raising of capital that such a sale entails) in a forum does not suffice to establish general jurisdiction there. *Toledo Rys. & Light Co. v Hill*, 244 U.S. 49, 53 (1917); *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000). (*See also* App. D-16 to D-17 (citing cases).) It follows that the mere promotion or solicitation of the sale of securities cannot suffice. *Second*, even the promotion and solicitation of the sale of *products and services central to a corporation's business*, including the dissemination of information about those products and services, in the forum are insufficient to satisfy the jurisdictional test. *See, e.g., People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 87 (1918); *Green v. Chicago, Burlington, & Quincy Ry. Co.*, 205 U.S. 530, 533-34 (1907); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1200 (4th Cir. 1993); *Gehling v. St. George's Sch. of Med., Ltd.*, 773 F.2d 539, 542-43 (3d Cir. 1985); *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 215, 217 (1st Cir. 1984); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242-43 (9th Cir. 1984); *Budget Rent-a-Car v. Eighth Judicial Dist. Court*, 835 P.2d 17, 19 (Nev. 1992); *Wainscott v. St. Louis-San Francisco Ry. Co.*, 351 N.E.2d 466, 471-74 (Ohio 1976). Again, it follows that the mere promotion or solicitation of the sale of securities cannot suffice.

Accordingly, the Second Circuit's conclusion that investor relations activities performed by an agent of a defendant are "general business" activities sufficient to permit the exercise of general jurisdiction conflicts with the law of numerous other jurisdictions. Similarly, the Second Circuit's view that an agent's "physical corporate presence" in New York alone permits the assertion of general jurisdiction (*see* App. A-16), cannot be reconciled with the law in other circuits. If an agent's mere physical presence were controlling (without regard to the *nature* of the agent's activities), then the exercise of general jurisdiction would be permissible whenever an agent is present in the forum. This is not the law anywhere else, as is clear from the numerous cases finding the exercise of general

jurisdiction impermissible despite the permanent physical presence of the defendant's agent in the forum state. *See Consolidated Dev. Corp.*, 216 F.3d at 1293; *Nichols*, 991 F.2d at 1198; *Conti v. Pneumatic Prods. Corp.*, 977 F.2d 978, 981 (6th Cir. 1992); *Gehling*, 773 F.2d at 542-43; *Glater*, 744 F.2d at 215; *Congoleum Corp.*, 729 F.2d at 1242 ("[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action."). (*See also* App. D-23.)[15]

III. The Second Circuit departed from holdings of this Court when it held that the federal courts have Article III subject-matter jurisdiction over suits between aliens for claims arising under customary international law.

The federal courts' subject-matter jurisdiction over this action is premised upon the Second Circuit's holding in *Filartiga* that the federal courts have independent Article III subject-matter jurisdiction over claims for violation of uncodified customary international law because such claims arise under federal common law and hence "the Laws of the United States" within the meaning of Article III of the United States Constitution. *See supra* pp. 4-5 and note 4; *infra* note 19. That holding also underlies the Second Circuit's conclusion that there is a "policy favoring receptivity" of such

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[15] The Second Circuit's rule, if not reversed, will have significant legal, economic and commercial consequences. Subjecting foreign corporations to general jurisdiction in New York based solely upon NYSE listings and related promotional activities, especially to answer for the open-ended and standardless claims endorsed by *Filartiga*, will injure the interests of the United States by diminishing the ability of the NYSE, which is in active competition for foreign listings with the London stock exchange, to secure listings and rival London as the world's primary global securities market. (App. H ¶¶ 6-11.) It will also potentially overload the dockets of the Southern District of New York by making it the single jurisdiction in the world where most global corporations (there are over 800 foreign corporations whose securities are traded on the NYSE) can be sued—regardless of their business locations or activities. (App. H ¶ 13.)

claims, *see supra* Sec. I.A, and accounts in part for the Second Circuit's unprecedented ruling on personal jurisdiction, *see supra* note 14.

Filartiga is wrong. It is inconsistent with the Constitution, which includes treaties but not customary international law within its listing (in Articles III and VI) of supreme federal law; the only mention of international law in the Constitution is in Article I, which gives *Congress*, not the courts, the discretionary authority to "define and punish"—and thereby federalize—the "Law of nations". U.S. Const. art. I, § 8, cl. 10. *Filartiga* also conflicts with long-standing and repeated assertions by this Court that uncodified international law does not present a federal question or arise under the laws of the United States. *See, e.g., N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875) (holding that the Court lacks jurisdiction to review "the law of nations applicable to this case" because that law does not involve "the constitution, laws, treaties, or executive proclamations, of the United States" and, therefore does not present "any Federal question"); *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (holding that claim of "forcible seizure in another country, and transfer by violence, force, or fraud to this country" raises no federal question and that "the decision of that question is as much within the province of the State court, as a question of common law, or of the law of nations, of which that court is bound to take notice" and of which the Court has "no right to review"); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) (noting that if a "question of international law" is decided in state court, "the Constitution and laws of the United States have not authorized" Supreme Court review of the decision); *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924). It is particularly instructive to compare the reasoning of *Filartiga* with that of Justice Bradley, the sole dissenting Justice in *New York Life*, who argued that a claim under "unwritten international law" arose under the "laws of the United States". 92 U.S. at 287-88 (Bradley, J., dissenting). The Second Circuit has essentially adopted the reasoning of a

single dissenting Justice and made it the law.

In concluding that uncodified international law has the status of federal law, *Filartiga* failed to reconcile, or even cite, these cases. Instead, the Second Circuit made the crucial analytical mistake of taking out of context statements by this Court that international law is "part of our law" and "part of the law of the land". 630 F.2d at 887 (internal quotation marks omitted).[16] Each of those statements was made prior to *Erie Railroad Co. v. Tompkins*, which held that "[t]here is no federal general common law". 304 U.S. 64, 78 (1938). Before *Erie*, international law (like the law of tort and contracts) had been a part of this federal general common law, which, though not itself raising a federal question, provided rules of decision for federal courts that otherwise had jurisdiction over a case. *See Huntington*, 146 U.S. at 683 (explaining that if a "question of international law" arises in federal court, "it is one of those questions of general jurisprudence which that court must decide for itself"). Pronouncements about the law of nations in the pre-*Erie* cases relied on by the Second Circuit in *Filartiga* involved such an application of general common law in cases over which the federal courts had an independent Article III jurisdictional basis (such as diversity or admiralty), *see, e.g.*, *The Paquete Habana*, 175 U.S. 677 (1900), and simply had no bearing on the actual question presented in *Filartiga*, *i.e.*, whether uncodified customary international law arises under the laws of the United States within the meaning of Article III.[17]

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[16] *Filartiga*'s conceptual misstep is criticized in depth in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). *See also* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205 (1988).

[17] The one post-*Erie* case cited in *Filartiga* was *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which held that the act of state doctrine had the status of modern federal common law. But this Court made

Indeed, *Erie* expressly disavowed the two major premises on which nineteenth century jurisprudence was—and *Filartiga* is—based. *First*, this Court rejected the idea that the federal courts can apply law not derived from a sovereign source, noting that "law in the sense in which courts speak of it today does not exist without some definite authority behind it". *Erie*, 304 U.S. at 79 (internal quotation marks omitted). *Second*, this Court rejected the legal fiction that courts "discover" common law rules, explaining that the common law "is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject" and noting that under the Constitution, the federal courts lack this general common-lawmaking power. *Id*, 304 U.S. at 78 (internal quotation marks omitted). *Filartiga* rests precisely on both these premises; it refers to a source of law (the norms of international law) that has no sovereign authority behind it, *see supra* note 2, and grants the federal courts common-lawmaking authority to fashion general rules relating to that "law".[18]

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clear in *Sabbatino* that the act of state doctrine, with its "'constitutional' underpinnings", originated not in international law but in constitutional separation of powers principles. *Id.* at 422-24. If it has any bearing on the question presented here, *Sabbatino* cuts the opposite way—it "declared the ascertainment and application of international law beyond the competence of the courts of the United States", at least where the acts of a foreign government are involved, *id.* at 439 (White, J., dissenting), and "did not consider international law to be part of the law of the United States in the sense that United States courts must find and apply it as they would have to do if international legal rules had the same status as other forms of United States law", Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 Mich. J. Int'l L. 450, 463 (1989).

[18] In contrast to the "federal general common law" that was repudiated in *Erie*, there is a modern, limited form of federal common law that has the status of federal law. However, even if there were a reason to reexamine the holdings of *New York Life*, *Ker*, *Huntington* and *Oliver American Trading Co.* in light of more recent cases—and there is not—this Court would conclude (again) that customary international law is not domestic federal law. Consistent with the notion that federal courts are powerless to apply law not derived from a sovereign source, modern federal common law

Filartiga also has radical implications for domestic governance. Post-*Erie* federal common law is binding on the states under the Supremacy Clause. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). If *Filartiga* were correct, then norms of international law (as developed by federal courts pursuant to a standardless and open-ended common-lawmaking approach) would preempt inconsistent state laws and practices. Wholesale federal court supervision of the several states for compliance with unwritten principles of international law would follow. Similarly, if customary international law were federal law, then the President would have a duty under the Take Care Clause of the Constitution to ensure that customary international law is faithfully executed.

This issue has engendered confusion and conflict among the circuit courts. The D.C. Circuit has held that *Filartiga*-style claims are not justiciable in federal court. *Tel-Oren*, 726 F.2d at 775 (per curiam). Although there was no single rationale for the decision in *Tel-Oren*, "[t]he opinions of Judge Bork and Judge Robb are fundamentally at odds with the decision of the Second Circuit in *Filartiga*". *Id.* at 775 (Edwards, J., concurring). Judge Bork, who found that federal common law does not "provide[] a cause of action for international law violations", *id.* at 810 (Bork, J., concurring), described *Filartiga* as "fundamentally wrong and certain to produce

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applies only where necessary to further "a genuinely identifiable (as opposed to judicially constructed) federal policy". *O'Melveny & Meyers v. F.D.I.C.*, 512 U.S. 79, 89 (1994); *cf. D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (observing that "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them"). There exists no identifiable federal policy favoring the creation of federal causes of action arising under customary international law. Indeed, to the extent there is any identifiable policy with respect to the international law of human rights, it cuts the other way, for (with some narrow exceptions, such as the TVPA) the political branches have consistently insisted that the international human rights agreements that are one of the primary sources of customary international law do *not* have domestic force. *See, e.g., Akhtar v. Reno*, 123 F. Supp. 2d. 191, 196 (S.D.N.Y. 2000).

pernicious results", *id.* at 801. Judge Robb, who found *Filartiga*-style claims to be nonjusticiable political questions, criticized *Filartiga* as "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure". *Id.* at 826 n.5 (Robb, J., concurring). Moreover, although other courts to consider the issue have permitted *Filartiga*-style claims to form the basis for Article III "arising under" jurisdiction, some have rested that conclusion on a different (but equally faulty) rationale. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996) (holding that the ATS, despite plainly being a pure jurisdictional statute, creates a private right of action). Significantly, none of these courts has even attempted to reconcile its holding with the decisions of this Court discussed above, causing *Filartiga* and its progeny to come under scholarly attack. *See supra* note 16.

Judge Edwards remarked seventeen years ago that this is "an area of law that cries out for clarification by the Supreme Court". *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring). Judge Bork agreed that "the confusion surrounding this subject" required "clarification elsewhere", and noted that "[s]ince [the ATS] appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed". *Id.* at 823 (Bork, J, concurring). These observations are even truer today, given the dramatic recent rise in cases of this type, *see supra* note 3, and the comprehensive treatment this subject has received since *Tel-Oren* in both the lower courts and the academic literature. This case presents the opportunity for that clarification.[19]

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[19] If this Court were to grant the writ and reaffirm that customary international law is not federal law, then plaintiffs' claimed violations of international law would no longer provide an independent basis for Article III subject-matter jurisdiction over this action. No other colorable basis exists. Plaintiffs' lack standing to allege violations of the three United States treaties pleaded in the Amended Complaint because those treaties are not self-executing and provide no private rights of action. *See, e.g., Igartua*

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit.

January 19, 2001

Respectfully submitted,

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de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam) (International Covenant on Civil and Political Rights); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-74 (7th Cir. 1985) (United Nations Charter); *Akhtar*, 123 F. Supp. 2d. at 196-97 (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment). Plaintiffs' pleading of a violation of the federal RICO statute does not provide a basis for jurisdiction because, under any test, that statute does not apply to the foreign conduct at issue here. *See, e.g., North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1052-53 (2d Cir. 1996); *Alfadda v. Fenn*, 966 F. Supp. 1317, 1336 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 41 (2d Cir. 1998); *Giro v. Banco Espanol de Credito, S.A.*, No. 98 Civ. 6195, 1999 WL 440462, at *3 (S.D.N.Y. June 28, 1999), *aff'd*, 208 F.3d 203 (2d Cir.), *cert. denied*, 121 S. Ct. 62 (2000).

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 14, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: October 22, 1999 Decided: September 14, 2000)

Docket Nos. 99-7223[L], 99-7245[XAP]

KEN WIWA, individually and as Administrator of the Estate of his deceased father, KEN SARO-WIWA, OWENS WIWA, and BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Plaintiffs -Appellants-Cross-Appelles,

-v.-

ROYAL DUTCH PETROLEUM COMPANY, and SHELL TRANSPORT AND TRADING COMPANY, P.L.C.,

Defendants-Appellees-Cross-Appellants.

Before:

OAKES, LEVAL, and POOLER,

Circuit Judges.

Appeal from the judgment of the United States District Court for the Southern District of New York (Wood, *J.*) dismissing on *forum non conveniens* grounds suit under the Alien Tort Claims Act against foreign corporations alleged to have participated with the Nigerian government in human rights violations committed in Nigeria. The Court of Appeals (Leval, *J.*) holds (1) the district court's exercise of personal jurisdiction over the defendants was appropriate, but (2) the district court erred in dismissing on *forum non conveniens* grounds, in failing to give proper consideration to the choice of a U.S. forum by U.S. resident plaintiffs and to the interests of the United States in providing a forum for the adjudication of claims alleging international human rights abuses.

Affirmed in Part, Reversed in Part, and Remanded.

JUDITH BROWN CHOMSKY, Elkins Park, PA (Jennifer M. Green, Beth Stephens, and Richard Herz, Center for Constitutional Rights, New York, NY on the brief) for *Plaintiffs-Appellants-Cross-Appellees.*

RORY O. MILLSON, Cravath, Swaine & Moore, New York, NY (Sandra C. Goldstein on the brief) for *Defendants-Appellees-Cross-Appellants.*

LEVAL, *Judge*:

This case concerns the application of *forum non conveniens* doctrine to suits under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, involving claimed abuses of the international law of human rights. Plaintiffs are three Nigerian émigrés, and a woman identified only as Jane Doe to protect her safety, who allege that they (or in some cases their deceased next of kin) suffered grave human rights abuses at the hands of the Nigerian authorities. Defendants Royal Dutch Petroleum Company ("Royal Dutch") and Shell Transport and Trading

Co., P.L.C. ("Shell Transport") are business corporations, incorporated in the Netherlands and the United Kingdom respectively, that are alleged to have directly or indirectly participated in or directed these abuses. The district court (Wood, *J.*) dismissed the action for *forum non conveniens* after determining that England is an adequate alternative forum and that a balancing of public interest and private interest factors make the British forum preferable. Plaintiffs appeal, arguing, inter alia, that the district court erred in not affording sufficient weight to the plaintiffs' choice of forum and to the interests of the United States in providing a forum for the adjudication of claims of abuse of international human rights. Defendants contend that, regardless of the propriety of a dismissal based on *forum non conveniens,* the court lacked personal jurisdiction over them. We hold that the district court properly exercised jurisdiction over the defendants. As to the dismissal for *forum non conveniens,* we reverse.

BACKGROUND

A. Allegations of the Complaint

Defendant Royal Dutch is a holding company incorporated and headquartered in the Netherlands. Defendant Shell Transport is a holding company incorporated and headquartered in England. The two defendants jointly control and operate the Royal Dutch/Shell Group, a vast, international, vertically integrated network of affiliated but formally independent oil and gas companies. Among these affiliated companies is Shell Petroleum Development Company of Nigeria, Ltd. ("Shell Nigeria"), a wholly-owned Nigerian subsidiary of the defendants that engages in extensive oil exploration and development activity in the Ogoni region of Nigeria.

The amended complaint ("the complaint") alleges that plaintiffs and their next of kin (hereafter collectively referred to as "Plaintiffs") were imprisoned, tortured, and killed by the

Nigerian government in violation of the law of nations at the instigation of the defendants, in reprisal for their political opposition to the defendants' oil exploration activities. According to the complaint, Shell Nigeria coercively appropriated land for oil development without adequate compensation, and caused substantial pollution of the air and water in the homeland of the Ogoni people. A protest movement arose among the Ogoni. Ken Saro-Wiwa was an opposition leader and President of the Movement for the Survival of the Ogoni People (MSOP); John Kpuinen was a leader of the MSOP's youth wing.

Allegedly, Shell Nigeria recruited the Nigerian police and military to attack local villages and suppress the organized opposition to its development activity. Saro-Wiwa and Kpuinen were repeatedly arrested, detained and tortured by the Nigerian government because of their leadership roles in the protest movement. In 1995, Saro-Wiwa and Kpuinen were hanged, along with other Ogoni leaders, after being convicted of murder by a special military tribunal. Allegedly, they were convicted on fabricated evidence solely to silence political criticism and were not afforded the legal protections required by international law. The complaint further alleges that plaintiff Owens Wiwa (Saro-Wiwa's brother) was illegally detained by Nigerian authorities, that plaintiff Jane Doe was beaten and shot by the Nigerian military in a raid upon her village, and that Saro-Wiwa's family—including Ken Saro-Wiwa's 74-year-old mother—were beaten by Nigerian officials while attending his trial.

According to the complaint, while these abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants. The Royal Dutch/Shell Group allegedly provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages, procured at least some of these attacks, participated in the

fabrication of murder charges against Saro-Wiwa and Kpuinen, and bribed witnesses to give false testimony against them.[1]

B. Facts Relating to Jurisdiction in New York

1. Defendants' New York Stock Exchange Listings and Sundry Activities

Neither of the defendants has extensive direct contacts with New York. Both companies list their shares, either directly or indirectly,[2] on the New York Stock Exchange. They conduct activities in New York incident to this listing, including the preparation of filings for the Securities and Exchange Commission (SEC) and the employment of transfer agents and depositories for their shares. Royal Dutch also maintains an Internet site, accessible in New York. They have participated in at least one lawsuit in New York as defendants, without contesting jurisdiction. They have for many years retained New York counsel.

Defendants own subsidiary companies that do business in the United States, including Shell Petroleum Inc. (SPI), a Delaware corporation. SPI in turn owns all the shares of Shell Oil Company (Shell Oil), the well-known oil and gas concern. Shell Oil has extensive operations in New York and is undisputedly subject to the jurisdiction of the New York courts.

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[1] For purposes of this opinion relating to jurisdiction and forum *non conveniens*, we assume the truth of the allegations (while implying no views on the truth or falsity of the allegations).

[2] Shares of Royal Dutch are traded directly on the New York Stock Exchange. Shell Transport's shares are traded indirectly in the United States; investors may purchase American Depository Receipts (ADR's) for shares of Shell, rather than shares themselves.

2. Defendants' Maintenance of an Investor Relations Office in New York City

The defendants also maintain an Investor Relations Office in New York City, administered by James Grapsi, whose title is "Manager of Investor Relations." The office is nominally a part of Shell Oil. However, all of its functions involve facilitating the relations of the parent holding companies, the defendants Royal Dutch and Shell Transport, with the investment community. The expenses of the office (consisting primarily of rent and salaries) are directly paid in the first instance by Shell Oil, but Shell Oil is reimbursed by the defendants, who therefore bear the full expense of the office. Those expenses average about $45,000 per month, or about $500,000 per year. The Investor Relations Office's duties involve fielding inquiries from investors and potential investors in Royal Dutch and Shell Transport, mailing information about the defendants to thousands of individuals and entities throughout the United States, and organizing meetings between officials of the defendants and investors, potential investors, and financial analysts. Each year the Investor Relations Office organizes about six such sessions and schedules them for various financial centers throughout the United States, including New York. Grapsi manages these functions out of a New York City office located in the Southern District of New York, and characteristically seeks the defendants' approval before scheduling meetings and making other similar decisions.

C. Proceedings Below

Plaintiffs filed this action on November 8, 1996 and filed an amended complaint on April 29, 1997. The amended complaint seeks damages under the ATCA, the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, international law and treaties, Nigerian law, and various state law torts. More specifically, the complaint alleges that the defendants are liable for summary execution; crimes against humanity; torture; cruel, inhuman, and degrading

treatment; arbitrary arrest and detention; violations of the rights to life, liberty, security of the person, and peaceful assembly and association; wrongful death; assault and battery; intentional and negligent infliction of emotional distress; and conspiracy. It is not entirely clear whether the liability of the defendants is predicated on their own actions, on a theory of responsibility for the actions of their subsidiary Shell Nigeria, or on a combination of both.

At the time of the filing, two of the four plaintiffs (Blessing Kpuinen and Owens Wiwa) lived in the United States, though not in New York.[3]

The defendants moved to dismiss for lack of personal jurisdiction, *forum non conveniens,* and failure to state a claim. In a Report and Recommendation dated March 31, 1998, Magistrate Judge Henry Pitman recommended that Judge Wood dismiss the case for lack of jurisdiction or, alternatively, for *forum non conveniens.* Explicitly reserving the "difficult" questions of substantive law raised by the defendants' 12(b)(6) motion, Magistrate Judge Pitman found that neither the maintenance of the Investor Relations Office nor the defendants' direct actions in New York, were sufficient to constitute "doing business" in New York, as required to establish general jurisdiction under N.Y. C.P.L.R. § 301. Turning to the *forum non conveniens* issue, he determined that England was an "adequate alternative forum" and that the various factors a court is required to balance in evaluating such a motion favor adjudication of the dispute in England.

Upon plaintiffs' objections to the Magistrate Judge's Report, Judge Wood, by order dated September 25, 1998, found that jurisdiction over the defendants was established under § 301 by virtue of their maintenance of the Investor Relations Office in New York, but accepted the Magistrate Judge's recommendation to dismiss for *forum non conveniens.*

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[3] Owens Wiwa has since moved to Canada.

Plaintiffs moved for reconsideration in light of this court's decision in *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). By order dated January 20, 1999, Judge Wood granted their motion, to the extent of conditioning dismissal on the defendants' commitment to consent to service of process in England, comply with all discovery orders, pay any judgment rendered in England, waive a security bond, and waive a statute of limitations defense if an action is begun in England within one year of the conclusion of these proceedings, which conditions defendants accepted. Otherwise the motion was denied.

DISCUSSION

A. Personal Jurisdiction

Under the Federal Rules of Civil Procedure, a court may exercise jurisdiction over any defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located," Fed. R. Civ. P. 4(k)(1)(a), provided of course that such an exercise of jurisdiction comports with the Fifth Amendment's Due Process Clause. The question is therefore whether the defendants may be subjected to the jurisdiction of the courts of the State of New York.

Before the court below, plaintiffs offered multiple theories as to why New York could properly exercise personal jurisdiction over the defendants. While the Magistrate Judge rejected all of these theories, the district court held that, under prevailing law, the activities of the Investor Relations Office on the defendants' behalf in New York were both attributable to the defendants and sufficient to confer jurisdiction. On appeal, defendants make four arguments: (1) these activities are not attributable to the defendants for jurisdictional purposes; (2) these New York activities cannot be considered in the jurisdictional calculus because they are merely "incidental" to a stock market listing and are jurisdictionally inconsequential

as a matter of law; (3) the Investor Relations activities are legally insufficient to confer general jurisdiction; and (4) exercising jurisdiction over the defendants would violate the fairness requirement of the Due Process Clause. For the reasons discussed below, we reject each of these contentions and hold that the defendants are subject to personal jurisdiction in the Southern District of New York.[4]

(1) *The Agency Analysis*

Under New York law, a foreign corporation is subject to general personal jurisdiction in New York if it is "doing business" in the state. *See* N.Y. C.P.L.R. § 301 (codifying caselaw that incorporates "doing business" standard); *see also Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985). "[A] corporation is 'doing business' and is therefore 'present' in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York 'not occasionally or casually, but with a fair measure of permanence and continuity.' " *Id.* (quoting *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917)). In order to establish that this standard is met, a plaintiff must show that a defendant engaged in "continuous, permanent, and substantial activity in New York." *Landoil Resources Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1991).

The continuous presence and substantial activities that satisfy the requirement of doing business do not necessarily need to be conducted by the foreign corporation itself. In certain circumstances, jurisdiction has been predicated upon activities performed in New York for a foreign corporation by an agent. Under well-established New York law, a court of New York may assert jurisdiction over a foreign corporation when it

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[4] Because we hold that jurisdiction is properly exercised over the defendants on the basis of the activities of the Investor Relations Office, we do not reach any of the other jurisdictional issues raised by the plaintiffs. We express no views on the merits of any of their alternative arguments.

affiliates itself with a New York representative entity and that New York representative renders services on behalf of the foreign corporation that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available. *See, e.g., Frummer v. Hilton Hotels Int'l Inc.,* 19 N.Y.2d 533, 537 (1967) (finding jurisdiction over foreign hotel chain based on the activities of affiliated reservations service); *Gelfand v. Tanner Motor Tours, Ltd.,* 385 F.2d 116, 120-21 (2d Cir. 1967) (applying *Frummer* to find jurisdiction over tour operator based on the activities of affiliated travel agent). To come within the rule, a plaintiff need demonstrate neither a formal agency agreement, *see, e.g., New York Marine Managers, Inc. v. M. V. "Topor-1", 716* F. Supp. 783, 785 (S.D.N.Y. 1989), nor that the defendant exercised direct control over its putative agent, *see, e.g., Palmieri v. Estefan,* 793 F. Supp. 1182, 1194 (S.D.N.Y. 1992). The agent must be primarily employed by the defendant and not engaged in similar services for other clients. *See, e.g., Miller v. Surf Properties, Inc.,* 4 N.Y.2d 475, 481 (1958) (holding that independent contractors with many clients are not considered agents of their individual clients for jurisdictional purposes).

Both Magistrate Judge Pitman and Judge Wood found that Grapsi and the Investor Relations Office were agents of the defendants for jurisdictional purposes. We agree. While nominally a part of Shell Oil, Grapsi and the Investor Relations Office devoted one hundred percent of their time to the defendants' business. Their sole business function was to perform investor relations services on the defendants' behalf. The defendants fully funded the expenses of the Investor Relations Office (including salary, rent, electricity, mailing costs, etc.), and Grapsi sought the defendants' approval on important decisions.

The defendants nonetheless argue that the relationship does not meet the *Frummer/Gelfand* test. They contend the services of the Investor Relations Office were not sufficiently important

that the defendants would have performed them if an agent had been unavailable. We do not find this argument persuasive. While it is true that the Investor Relations Office was not directly involved with the core functions of the defendant's business—the operation of an integrated international oil business, its work was of meaningful importance to the defendants. The defendants are huge publicly-traded companies with a need for access to capital markets. The importance of their need to maintain good relationships with existing investors and potential investors is illustrated by the fact that they pay over half a million dollars per year to maintain the Investors Relations office. In our view, the amount invested by the defendants in the U.S. investor relations activity substantially establishes the importance of that activity to the defendants.

Defendants also contend that, if they were to perform the Investor Relations services themselves, it would not necessarily be in New York. The argument is extremely weak. While of course it is true, especially given technological advances in communication, that such an office *could* conceivably be located anywhere in the world, the strongest indications are that the defendants selected New York as the locus of the present office because that is the most logical place for it. Insofar as the office concerns itself with investors in the U.S. capital markets, it makes better sense to have the office in the United States, rather than in another country. New York is widely regarded as the capital of U.S. capital markets. It seems most likely that the Investor Relations Office established by Shell Oil for the benefit of its parents and at their insistence was established in New York City because that was the best place for such an office, and that it would most likely be located in New York City regardless whether operated directly by the defendants, by Shell Oil, or by any other agent.[5] *See, e.g., Burger King Corp.*

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[5] Grapsi testified that 100 of the 140 attendees at a December 1996 investor relations meeting for financial writers and members of the inter-

v. Rudzewicz, 471 U.S. 462, 475 (1985) (describing as "essential" element in jurisdictional inquiry the question whether "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"); *Hanson v. Denkla,* 357 U.S. 235, 253 (1958) (same); *LiButti v. United States,* 178 F.3d 114, 122 (2d Cir. 1999) (same).

The defendants' argument is also difficult to square with the facts of the seminal agency jurisdiction cases, *Frummer* and *Gelfand*. In those cases, the foreign corporations were not absolutely required to choose New York as the locus of their reservations services. *See generally Frummer*, 19 N.Y.2d 533 (involving booking agent that took reservations and performed public relations services for a foreign hotel chain); *Gelfand,* 385 F.2d 116 (involving sales representative that took reservations and performed other services for out-of-state tour operator). They could have located those operations elsewhere, either foregoing the New York market entirely or arranging to service New York customers more circuitously. However, in both those cases the defendants chose to locate offices in Manhattan to establish easy access to New York's rich market of potential customers, *see Gelfand,* 385 F.2d at 121, thereby better serving their own interests. The circumstances of the present case support the inference that the defendants made a similar calculation when they chose to locate their Investor Relations Office in New York.

(2) *The Nature of the Activities of the Investor Relations Office*

The defendants contend their Investor Relations Office is an activity that is "incidental" to their listing on the New York Stock Exchange. They cite to a long stream of caselaw reaching back over a century that they argue precludes courts from

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national community came from New York and only five came from other locations in the United States.

considering activity "incidental" to stock market listings when evaluating whether a corporation is doing business in the state of New York. We agree that the prevailing caselaw accords foreign corporations substantial latitude to list their securities on New York-based stock exchanges and to take the steps necessary to facilitate those listings (such as making SEC filings and designating a depository for their shares) without thereby subjecting themselves to New York jurisdiction for unrelated occurrences. *See, e.g., Celi v. Canadian Occidental Petroleum Ltd.,* 804 F. Supp. 465, 468 (E.D.N.Y. 1992); *Fowble v. Chesapeake & Ohio Ry. Co.,* 16 F.2d 504, 505 (S.D.N.Y. 1926); *Clews v. Woodstock Iron Co.,* 44 F. 31, 32 (S.D.N.Y. 1890); *Freeman v. Bean,* 266 N.Y. 657, 657-58 (1935). However, defendants misread the scope of the existing caselaw when they argue that all contacts related to stock exchange listings are stripped of jurisdictional significance.

To begin with, it is not that activities necessary to maintain a stock exchange listing do not count, but rather that, without more, they are insufficient to confer jurisdiction. *See, e.g., Pomeroy v. Hocking Valley Ry. Co.*, 218 N.Y. 530, 536 (1916) ("The payment, too, of dividends and the transfer of stock while perhaps not sufficient of themselves to constitute the transaction of business . . . , doubtless are of some importance in connection with other facts."); *Fowble,* 16 F.2d at 505 (such contacts are "of some importance in determining whether the corporation [i]s doing business in the state, although such facts may not be sufficient in itself to constitute such doing of business"). Other cases in this line imply a similar result when they suggest that jurisdiction is not available over a corporation whose *only* contacts with the forum are listings on the New York stock exchanges and ancillary arrangements involving the distribution of their shares. *See, e.g., Grossman v. Sapphire Petroleums Ltd.,* 195 N.Y.S.2d 851, 852-53 (Sup. Ct. 1959).

The Investor Relations Office conducts a broader range of activities on the defendants' behalf than those described in the cited cases as merely "incidental" to the stock exchange listing.

These activities, which range from fielding inquiries from investors and potential investors to organizing meetings between defendants' officials and investors, potential investors, and financial analysts, do not properly come within the rule upon which the defendants rely. The defendants' Investor Relations program results not from legal or logistical requirements incumbent upon corporations that list their shares on the New York Stock Exchange, but from the defendants' discretionary determination to invest substantial sums of money in cultivating their relationship with the New York capital markets. It appears the location of the office in New York City has far more to do with the importance of New York as a center of capital markets than with the proximity of the New York Stock Exchange. A company can perfectly well maintain a listing on the New York (or any other) Stock Exchange without maintaining an office nearby to cultivate relations with investors.

In summary, the large body of caselaw the defendants point to at most stands for the proposition that, absent other substantial contacts, a company is not "doing business" in New York merely by taking ancillary steps in support of its listing on a New York exchange. The activities chargeable to the defendants go well beyond this minimum. We conclude that the activities of the Investor Relations Office go beyond the range of activities that have been held insufficient to subject foreign corporations to the jurisdiction of New York courts.

(3) *The Sufficiency of Contacts*

The defendants further contend that the activities of the Investor Relations Office are quantitatively insufficient to confer jurisdiction. *See also Landoil,* 918 F.2d at 1043 (quoting Weinstein, Korn & Miller, *New York Civil Practice,* ¶ 301.16, at 3-32) (requiring "continuous, permanent and substantial activity"). We find no merit to this contention. Where, as here, plaintiffs' claim is not related to defendants' contacts with New York, so that jurisdiction is properly characterized as 'general,'

plaintiffs must demonstrate "the defendant's 'continuous and systematic general business contacts.' " *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996) (quoting *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 464 U.S. 408, 416 (1984). Defendants' contacts constitute "a continuous and systematic general business" presence in New York and therefore satisfy the minimum contacts portion of a due process analysis.

Citing to a string of cases holding that solicitation of business plus minimal additional contacts satisfies Section 301, Judge Wood characterized the activities of the Investor Relations Office as satisfying the test of "solicitation plus." The defendants dispute this characterization, arguing that Grapsi did not perform "solicitation" because he did not offer to buy or sell any stock in the corporation. As Judge Wood noted, however, a finding of "solicitation" in the jurisdictional context does not necessarily require "solicitation" in the sense of an offer of contract. Rather, the central question is whether the defendant (or its agent) behaved in such a way so as to encourage others to spend money (or otherwise act) in a manner that would benefit the defendant. *Cf., e.g., Landoil*, 918 F.2d at 1044 (trips to New York to service existing accounts constitutes "solicitation"). Judge Wood's characterization of the Investor Relations Office's activities as "solicitation" appears to be a sound interpolation of pre-existing precedent into a new factual context.

However, we need not rely upon such a characterization to support general jurisdiction in this case, because even without relying on the "solicitation plus" formulation, the activities of the Investor Relations Office meet the "doing business" standard. In assessing whether jurisdiction lies against a foreign corporation, both this court and the New York courts have focused on a traditional set of indicia: for example, whether the company has an office in the state, whether it has any bank accounts or other property in the state, whether it has a phone listing in the state, whether it does public relations work there,

and whether it has individuals permanently located in the state to promote its interests. *See, e.g., Hoffritz for Cutlery,* 763 F.2d at 58; *Frummer,* 19 N.Y.2d at 537. The Investor Relations Office, whose activities are attributable to the defendants under the *Frummer* analysis, meets each of these tests. It constitutes a substantial "physical corporate presence" in the State, permanently dedicated to promoting the defendants' interests. *Artemide SpA v. Grandlite Design & Mfg. Co.,* 672 F. Supp. 698, 703 (S.D.N.Y. 1987); *see also, e.g., Lane v. Vacation Charters, Ltd.,* 750 F. Supp. 120, 125 (S.D.N.Y. 1990) ("Perhaps the most important factor needed for a finding of jurisdiction under CPLR § 301 is the in-state presence of employees engaged in business activity."); *cf. Landoil,* 918 F.2d at 1045 n.10 (noting that while periodic business trips to New York to solicit business did not confer jurisdiction, "renting a hotel room . . . on a systematic and regular basis might be the functional equivalent of an office in New York and therefore might be sufficient to establish presence within the state"). We agree with Judge Wood that the continuous presence of the Investor Relations program in New York City is sufficient to confer jurisdiction.

(4) *Fairness*

Finally, the defendants argue that it would violate the fairness requirement of the Due Process Clause for a New York court to exercise jurisdiction over them. Again, we disagree.

Personal jurisdiction may be exercised only when (1) the State's laws authorize service of process upon the defendant and (2) an assertion of jurisdiction under the circumstances of the case comports with the requirements of due process. *See, e.g., Kernan v. Kurz-Hastings, Inc.,* 175 F.3d 236, 240 (2d Cir. 1999). The required due process inquiry itself has two parts: whether a defendant has "minimum contacts" with the forum state and whether the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice—that is whether . . . [the exercise of jurisdiction] is reasonable under

the circumstances of a particular case." *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1027 (2d Cir. 1997) (internal quotations omitted).

As noted above, the defendants' contacts go well beyond the minimal. As a general rule, in making the constitutional analysis once a plaintiff has made a "threshold showing" of minimum contacts, the defendant must come forward with a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Robertson-Ceco Corp.*, 84 F.3d at 568 (internal quotations omitted). The defendants have not made any such compelling showing here.

While it is true that certain factors normally used to assess the reasonableness of subjection to jurisdiction do favor the defendants (they are foreign corporations that face something of a burden if they litigate here, and the events in question did not occur in New York), litigation in New York City would not represent any great inconvenience to the defendants. The defendants control a vast, wealthy, and far-flung business empire which operates in most parts of the globe. They have a physical presence in the forum state, have access to enormous resources, face little or no language barrier, have litigated in this country on previous occasions, have a four-decade long relationship with one of the nation's leading law firms, and are the parent companies of one of America's largest corporations, which has a very significant presence in New York. New York City, furthermore, where the trial would be held, is a major world capital which offers central location, easy access, and extensive facilities of all kinds. We conclude that the inconvenience to the defendants involved in litigating in New York City would not be great and that nothing in the Due Process Clause precludes New York from exercising jurisdiction over the defendants.

B. Forum Non Conveniens

Plaintiffs appeal from the decision of the district court to dismiss for *forum non conveniens*. The grant or denial of a

motion to dismiss for *forum non conveniens* is generally committed to the district court's discretion. *See, e.g., Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996). The deference accorded to a district court's discretion, however, presupposes that the court used the correct standards prescribed by the governing rule of law. *See Guidi v. Inter-Continental Hotels Corp.*, Nos. 97-7973, 99-7623, 2000 WL 1158788, at *2 (2d Cir. 2000) (quoting *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1991)). We believe that, as a matter of law, in balancing the competing interests, the district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations.

In 1947, the Supreme Court handed down a pair of decisions laying out the framework for *forum non conveniens* analysis that the federal courts follow to this day. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947); *Koster v. American Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947). Under these cases, *forum non conveniens* is a discretionary device permitting a court in rare instances to "dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim." *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998); *see also Gilbert,* 330 U.S. at 507. In assessing whether *forum non conveniens* dismissal is appropriate, courts engage in a two-step process: The first step is to determine if an adequate alternative forum exists. *See, e.g., Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n.22 (1981); *Gilbert,* 330 U.S. at 506-07. If so, courts must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake. *See, e.g., id.* at 508-09. The defendant has the burden to establish that an adequate alternative forum exists and then to show that the pertinent factors "tilt[ ] strongly in favor of trial in the foreign forum." *R.*

Maganlal & Co., 942 F.2d at 167. "[T]he plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508.

On appeal, plaintiffs challenge both prongs of the district court's finding. As to the first prong, they dispute the adequacy of a British forum, because three doctrines of English law—double actionability, transmissibility, and the act of state doctrine—would potentially bar a British court from reaching the subject matter of this dispute. As the parties' experts describe the British law, the doctrine of double accountability states that, with limited exceptions, torts committed in other countries are actionable in England only if they would be actionable under both English law and the law of the country in which the act was committed.[6] The doctrine of transmissibility holds that the question whether a decedent's claims transfer to his survivors is determined by the law of the decedent's nation.[7] The act of state doctrine bars, on comity grounds, the consideration of certain claims arising out of the official actions of foreign governments.[8]

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[6] On the doctrine of double actionability, the parties refer primarily to *Phillips v. Eyre*, 1870 L.R. 6 Q.B. 1, and Dicey & Morris, *Conflict of Laws* 1480 *et seq.* (12th ed. 1993).

[7] On transmissibility, the parties refer to Dicey & Morris, *supra* note 7, at 1521.

[8] The parties cite to numerous sources discussing the contours of the act of state doctrine. *See, e.g., Luthor v. Sagor* 1921 3 K.B. 532, 548; *Buttes Gas and Oil Co. v. Hammer (Nos. 2 & 3)*, 1981 3 All ER 616; Dicey & Morris, *supra* note 7, at 108-11, 996-97; Dame Rosalyn Higgins, *Problems & Process* 212 (1994). Subsequent to the briefing in this case, the House of Lords decided the twin appeals arising out of the arrest of Chilean Senator and former General Augusto Pinochet. The parties submitted a copy of that decision and letter briefs debating its meaning. *See generally Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* and *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (House of Lords Mar. 24, 1999) (appeals from divisional courts of the Queen's Bench Division).

At oral argument in this court, the defendants undertook not to invoke either double actionability or transmissibility to block the plaintiffs' claims in a British court. The defendant made no such undertaking concerning the act of state doctrine. It is not clear in any event what significance to accord to such undertakings. As the policies underlying the act of state doctrine are grounded not in the rights of the parties but in comity among nations, a court may well follow the doctrine regardless whether it was advanced by the party to be benefitted. Also, as to double actionability and transmissibility, the British courts might well follow British law to determine whether an action lies and whether the plaintiff has standing to bring it, regardless whether the defendant raised an argument based on these doctrines.

As to the act of state doctrine, the parties vigorously dispute whether the doctrine has broader contours in the British courts than in the United States. The defendants argue, furthermore, that availability of an adequate alternative forum focuses on the quality of the forum and its commitment to the rule of law and not on differences in substantive or procedural law between the competing fora that might influence the outcome of the trial. *See Piper*, 454 U.S. at 254 & n.22 (noting that rules of law less favorable to the plaintiff rarely affect the threshold inquiry into whether alternative forum is "adequate"); *PT United Can*, 138 F.3d at 74 (foreign forum still "adequate" alternative forum for RICO action despite absence of similar conspiracy statute).

We need not resolve these issues. We regard the British courts as exemplary in their fairness and commitment to the rule of law. Furthermore, we assume *arguendo* that there are no rules of British law that would prevent a British court from reaching the merits. We believe the order of dismissal must nonetheless be reversed as the defendants have not established as *Gilbert* requires that the pertinent factors tilt sufficiently strongly in favor of trial in the foreign forum.

In our view, the district court failed to give weight to three significant considerations that favor retaining jurisdiction for trial: (1) a United States resident plaintiff's choice of forum, (2) the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights, and (3) the factors that led the district court to dismiss in favor of a British forum were not particularly compelling. For the reasons developed below, we believe that they are outweighed by the considerations favoring exercise of the court's jurisdiction.

(1) *Deference to the Choice of a United States Forum by a Lawful United States Resident Plaintiff*

By definition, the doctrine of *forum non conveniens* contemplates the dismissal of lawsuits brought by plaintiffs in their favored forum in favor of adjudication in a foreign court. Nonetheless, a plaintiff's choice of forum is entitled to substantial deference and should only be disturbed if the factors favoring the alternative forum are compelling. *See, e.g., Gilbert,* 330 U.S at 508 ("[A] plaintiff's choice of forum should rarely be disturbed."); *Allstate Life Ins. Co. v. Linter Group Ltd.,* 994 F.2d 996, 1001 (2d Cir. 1993) ("[T]here is . . . a strong presumption in favor of a plaintiff's choice of forum."); *R. Maganlal & Co.,* 942 F.2d at 167 (as plaintiff's choice of forum is entitled to deference, *forum non conveniens* dismissal is only permissible where the relevant considerations "tilt[ ] strongly in favor of trial in the foreign forum"); *cf. Bell v. Hood,* 327 U.S. 678, 681 (1946) (plaintiff is "master" of his or her own lawsuit).

While any plaintiff's selection of a forum is entitled to deference, that deference increases as the plaintiff's ties to the forum increase. *See, e.g., Murray v. British Broad. Corp.,* 81 F.3d 287, 290 (2d Cir. 1996) (holding that a domestic plaintiff's choice of forum is entitled to more deference than a foreign plaintiff's); *see also Piper,* 454 U.S. at 255 n.23 (noting that the choice of a forum by its citizens and residents is enti-

tled to greater deference than a stranger's choice); *Koster,* 330 U.S. at 524 ("[A] real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown."). In a decision handed down since oral argument in this case, we overturned a *forum non conveniens* dismissal in a case brought by a United States citizen involving events occurring outside the United States where the defendant was unable to " 'establish such oppressiveness and vexation . . . as to be out of all proportion to plaintiff's convenience' " and where there were no compelling public interest considerations favoring litigation in the alterative foreign forum. *Guidi*, 2000 WL 1158788, at *3 (quoting *Koster,* 330 U.S. at 524).

These cases do not reflect a rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens.* Rather, they illustrate the manner in which a court must take into account the hardship dismissal would cause to a resident plaintiff when evaluating the *Gilbert* factors; in the words of this court the cited cases represent a "consistent, pragmatic application" of the *Gilbert* factors to actions in which a plaintiff has particular ties to the forum state. *Alcoa S.S. Co. v. M/V Nordic Regent,* 654 F.2d 147, 152 (2d Cir. 1980) (in banc). The *Gilbert* test requires a balancing of factors, and a plaintiff's lawful U.S. residence can be a meaningful factor supporting the plaintiff's choice of a U.S. forum. *Cf. Alcoa,* 654 F.2d at 155 *(forum non conveniens* should not be conditioned solely upon residence, but " 'residence is, of course, an important factor to be considered' ") (quoting *Silver v. Great American Insurance Co.,* 29 N.Y.2d 356, 361 (1972)).

That is the case not because of chauvinism or bias in favor of U.S. residents. It is rather because the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction. Also, while our courts are of course required to offer equal justice to all litigants, *see id.,* 654

F.2d at 152-53 (noting existence of treaties requiring "no less favorable" treatment of foreign nationals), a neutral rule that compares the convenience of the parties should properly consider each party's residence as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation.

During the last two decades, our caselaw and that of the Supreme Court has clearly and unambiguously established that courts should offer greater deference to the selection of a U.S. forum by U.S. resident plaintiffs when evaluating a motion to dismiss for *forum non conveniens*. *See, e.g., Murray,* 81 F.3d at 290; *Piper,* 454 U.S. at 255 n.23. Our earlier in-banc decision in *Alcoa,* 654 F.2d 147, is not to the contrary. In that case, we rejected the proposition that courts must accord "a talismanic significance to the citizenship or residence of the parties," *id.* at 154, and held that "citizenship [and] residence no longer are absolutely determinative factors," *id.* at 157, in the *forum non conveniens* analysis. *Alcoa* requires that we apply the *Gilbert* factors in evaluating a *forum non conveniens* motion, even when the plaintiff is a U.S. citizen or resident; *Murray* and *Piper* point to the important role the plaintiff's residence and citizenship potentially play in the *Gilbert* analysis; and *Guidi* illustrates that a plaintiff's U.S. citizenship and residence is entitled to consideration in favor of retaining jurisdiction, such that the *Gilbert* factors will favor dismissal (in the absence of strong public interest factors favoring dismissal) only if the defendant can establish " 'such oppressiveness and vexation . . . as to be out of all proportion to plaintiff's convenience.' " *Guidi,* 2000 WL 1158788, at *3 (quoting *Koster,* 330 U.S. at 524).[9]

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[9] We read *Guidi* as allowing for the possibility that, under certain circumstances, the public interest factors favoring dismissal might (by themselves or in combination with inconvenience to the defendant not quite rising to the level of "opressiveness and vexation") be strong enough to justify dismissal, notwithstanding the absence of "opressiveness and vexation." *See Guidi,* 2000 WL 1158788, at *3 (stating the *forum non con-*

In this case, the district court weighed against the plaintiffs that none of them were residents of the Southern District of New York but did not count in favor of their choice of a U.S. forum that two of them were residents of the United States. This was error. *See, e.g., Piper*, 454 U.S. at *255* n.23; *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 198 (2d Cir. 1987). The benefit for a U.S. resident plaintiff of suing in a U.S. forum is not limited to suits in the very district where the plaintiff resides, especially considering that the defendant may not be amenable to suit in the plaintiff's district of residence. *See, e.g., Guidi*, 2000 WL 1158788, at **4* (the "home forum" of an American citizen for *forum non conveniens* purposes is any "United States court"); *see also Piper*, 454 U.S. at 255 n.23 (distinguishing between "foreign" and "American" plaintiffs in explaining why greater deference is due to the forum choice of "citizens" and "residents"); *cf. Swift & Co. Packers v. Compania Colombiana del Caribe*, 339 U.S. 684, 697 (1950) ("[A] suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners."). In deciding whether to dismiss a case brought by a lawful U.S. resident plaintiff for *forum non conveniens*, the district should consider whether, in view of the plaintiff's U.S. residence, such a dismissal would cause plaintiff significant hardship.

In all of our cases in which we have deemed a plaintiff "foreign" and accorded that plaintiff's choice of forum less deference, the plaintiffs involved were foreign corporations or foreign-national individuals residing abroad. *See, e.g., Capital*

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veniens dismissal against a U.S. citizen seeking to invoke a U.S. forum may be appropriate if defendant presents a "clear showing of facts which . . . make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems" (quoting *Koster*, 330 U.S. at 524)). Furthermore, *Guidi's* focus on the balancing of defendant's inconvenience against plaintiff's implicitly recognizes that, depending on the particular circumstances, the degree of inconvenience that dismissal would impose on a U.S. resident will vary.

Currency Exch. N. V. v. National Westminster Bank, P.L.C., 155 F.3d 603, 611-12 (2d Cir. 1998), *cert. denied,* 119 S. Ct. 1459 (1999) (real parties in interest were English corporations); *PT United Can,* 138 F.3d at 74 (plaintiff was an Indonesian corporations); *In re Union Carbide,* 809 F.2d at 198 (plaintiffs were Indian citizens and residents). We have never accorded less deference to a foreign plaintiff's choice of a United States forum where that plaintiff was a U.S. resident.

In short, the district court applied an incorrect standard of law when it failed to credit the fact that two of the plaintiffs were United States residents as a consideration favoring plaintiff's choice of a U.S. forum.

(2) *The Application of* Forum Non Conveniens *Doctrine to ATCA Cases*

The plaintiffs also argue that the ATCA, as supplemented by the Torture Victim Prevention Act (TVPA), 28 U.S.C. § 1350 App., in 1991, reflects a United States policy interest in providing a forum for the adjudication of international human rights abuses, and that this policy interest should have a role in the balancing of the *Gilbert* factors.

The Alien Tort Claims Act was adopted in 1789 as part of the original Judiciary Act. In its original form, it made no assertion about legal rights; it simply asserted that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. For almost two centuries, the statute lay relatively dormant, supporting jurisdiction in only a handful of cases. *See, e.g., Filartiga v. Pena-Irala,* 630 F.2d 876, 887 & n.21 (2d Cir. 1980) (identifying only two previous cases that had relied upon the ATCA for jurisdiction). As the result of increasing international concern with human rights issues, however, litigants have recently begun to seek redress more frequently

under the ATCA. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (alleging torture of Ethiopian prisoners); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (alleging torture, rape, and other abuses orchestrated by Serbian military leader); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by former President of Phillippines); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (alleging claims against Libya based on armed attack upon civilian bus in Israel); *Filartiga*, 630 F.2d 876 (alleging torture by Paraguayan officials); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (alleging abuses by Guatemalan military forces).

These suits produced several important decisions interpreting the meaning and scope of the 1789 Act. For example, in *Filartiga v. Pena-Irala*, 630 F.2d at 880, 884-86, this court held that deliberate torture perpetrated under the color of official authority violates universally accepted norms of international human rights law, and that such a violation of international law constitutes a violation of the domestic law of the United States, giving rise to a claim under the ATCA whenever the perpetrator is properly served within the borders of the United States. More recently, we held in *Kadic v. Karadzic*, 70 F.3d at 239-40, 245, that the ATCA reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties.

In passing the Torture Victim Prevention Act, 28 U.S.C. § 1350 App., in 1991, Congress expressly ratified our holding in *Filartiga* that the United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation, and carried it significantly further. While the 1789 Act expressed itself in terms of a grant of jurisdiction to the district

courts,[10] the 1991 Act (a) makes clear that it creates *liability under U.S. law* where under "color of law, of any foreign nation" an individual is subject to torture or "extra judicial killing,"[11] and (b) extends its remedy not only to aliens but to any "individual," thus covering citizens of the United States as well. 28 U.S.C. § 1350 App. The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789–that the

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[10] The original purposes of the ATCA remain the subject of some controversy. The Act has no formal legislative history. In the most learned exposition of the statute's original purposes, Judge Edwards suggested that the statute was originally motivated by a desire to insure that claims by an alien against U.S. citizens or for incidents occurring in the United States were litigated in federal court rather than state court, so as to prevent the states from mishandling such cases and creating international incidents. *See Tel-Oren,* 726 F.2d at 782-83 (Edwards, J., concurring). Some scholars have suggested that the Act's original purpose may have been even narrower. For example, one 1995 article suggests that the statute was intended to remedy a single problem: torts committed by the crews of vessels in the course of stopping and boarding ships suspected of aiding the enemy in a time of war. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations,* 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Whatever the intent of the original legislators (a matter that is forever hidden from our view by the scarcity of relevant evidence), the text of the Act seems to reach claims for international human rights abuses occurring abroad. We reached the conclusion that such claims are properly brought under the Act in *Filartiga,* 630 F.2d at 880; Congress ratified our conclusion by passing the Torture Victim Protection Act, *see* H.R. Rep. No.102-367, at 4 (1991); *reprinted in* 1992 U.S.C.C.A.N. 84, 86; and we have since reaffirmed our conclusion, *see, e.g., Kadic v. Karadzic,* 74 F.3d 377, 378 (2d Cir. 1996) (opinion denying rehearing) (rejecting argument that new scholarly evidence precludes broad interpretation of ATCA). *Filartiga* remains the leading case interpreting the ATCA. As Judge Newman stated four years ago, "[w]e have neither the authority nor the inclination to retreat from that ruling." *Id.*

[11] "Extra judicial killing" is defined as "a deliberated killing" not authorized by the judgment of a court "affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 28 U.S.C. § 1350 App. In this opinion, we use the word "torture" to include both torture and "extra judicial killing," except where the context makes clear the more limited meaning is intended.

law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law. *See* H.R. Rep. No. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (noting that purposes of TVPA are to codify *Filartiga,* to alleviate separation of powers concerns, and to expand remedy to include U.S. citizens).

Whatever may have been the case prior to passage of the TVPA, we believe plaintiffs make a strong argument in contending that the present law, in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits. Two changes of statutory wording seem to indicate such an intention. First is the change from addressing the courts' "jurisdiction" to addressing substantive rights; second is the change from the ATCA's description of the claim as one for "tort . . . committed in violation of the law of nations . . ." to the new Act's assertion of the substantive right to damages under U.S. law. This evolution of statutory language seems to represent a more direct recognition that the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations.[12]

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[12] Plaintiffs argue that these statutes also raise a related but distinct U.S. policy interest in insuring that claims arising out of human rights abuses are adjudicated according to the standards of international law. In arguing for this principle, they assume that the law of nations necessarily provides the substantive standards for evaluating claims brought under the ATCA in situations where the underlying claims involve human rights abuses. While they may well be right that such a principle is implicit in the ATCA, the federal courts have never definitively resolved this choice-of-law question. *Compare Xuncax,* 886 F. Supp. at 180-83 (holding that international law provides substantive law for ATCA cases) with *Tel-Oren,* 726 F.2d at 777, 781-82 (Edwards, J., concurring) (suggesting that, while international law triggers jurisdiction under ATCA, tort laws of forum state might provide substantive causes of action), *and In re Estate of Ferdinand Marcos,* 978 F.2d at 503 (9th Cir. 1992) (approving district court procedure that based jurisdiction on international law but applied tort law of state

In *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998), we recognized the plaintiff's argument that "to dismiss . . . [a claim pursuant to the ATCA under *forum non conveniens*] would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations." We expressed "no view" on the question but directed the District Court to consider the issue on remand. *Id.* In this case, the issue is again advanced (in slightly different form, as *Jota* did not involve torture and the defendants in this case are not domestic entities).

Dismissal on grounds of *forum non conveniens* can represent a huge setback in a plaintiff's efforts to seek reparations for acts of torture. Although a *forum non conveniens* dismissal by definition presupposes the existence of another forum where the suit may be brought, *see Jota*, 157 F.3d at 158-59, dismissal nonetheless requires the plaintiff to start over in the courts of another nation, which will generally at least require the plaintiff to obtain new counsel, as well as perhaps a new residence.

One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass

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where underlying events occurred); *see also Filartiga*, 630 F.2d at 889 (holding that ATCA establishes cause of action for violations of international law but requiring the district court to perform a traditional choice-of-law analysis to determine whether international law, law of forum state, or law of state where events occurred should provide substantive law in such an action). Because our decision regarding the *forum non conveniens* dismissal is based on other grounds, we need not reach this question.

the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as "not our business."

The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is "our business," as such conduct not only violates the standards of international law but also as a consequence violates our domestic law. In the legislative history of the TVPA, Congress noted that universal condemnation of human rights abuses "provide[s] scant comfort" to the numerous victims of gross violations if they are without a forum to remedy the wrong. House Report at 3, 1992 U.S.C.C.A.N. at 85. This passage supports plaintiffs' contention that in passing the Torture Victim Prevention Act, Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts. If in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for *forum non conveniens,* we will have done little to enforce the standards of the law of nations.

This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of *forum non conveniens.* The statute has, however, communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business. The TVPA in our view expresses a policy favoring our courts' exercise of the jurisdiction conferred by the ATCA in cases of torture unless the defendant has fully met the burden of showing that the *Gilbert* factors "tilt[ ] strongly in favor of trial in the foreign forum." *R. Maganlal & Co.*, 942 F.2d at 167.

(3) *The* Forum Non Conveniens *Analysis in this Case*

We turn to the analysis of the *forum non conveniens* factors in their application to this case. We believe the rule of law applied by the district court was faulty, as noted above, in the following respects: (a) The district court counted against retention of jurisdiction that the plaintiffs were not residents of the Southern District of New York while failing to count in favor of retention that two of the plaintiffs were residents of the United States, and (b) the court failed to count in favor of retention the interest of the United States, as expressed in the TVPA, in providing a forum for the adjudication of claims of torture in violation of the standards of international law. Furthermore, the Magistrate Judge, whose findings were adopted by the district court, gave no consideration to the very substantial expense and inconvenience (perhaps fatal to the suit) that would be imposed on the impecunious plaintiffs by dismissal in favor of a British forum, and the inconvenience to the defendants that ultimately justified the dismissal seems to us to have been minimal.

Ordinarily, the conclusions of the district court in deciding whether to dismiss for *forum non conveniens* are given substantial deference and are not overturned except on a finding of abuse of discretion. *See, e.g., Peregrine Myanmar Ltd.*, 89 F.3d at 46. On the other hand, where the district court has not applied the correct rule of law, the same deference does not apply. *See, e.g., Guidi*, 2000 WL 1158788, at *2 (appellate review encompasses " 'whether the district court reached an erroneous conclusion on . . . the law' ") (quoting *R. Maganlal & Co.*, 942 F.2d at 167).

The issue of *forum non conveniens* is not settled by adding to the mix the considerations favoring retention arising from the U.S. residence of two of the plaintiffs and the policy expressed in the TVPA favoring adjudication of claims of torture in violation of international law. If the defendants advanced substantial interests supporting dismissal in favor of

a British forum we would either remand to the district court for reconsideration or, if the defendants interests were sufficiently substantial, sustain the dismissal notwithstanding our identification of interests in favor of retention that the district court did not consider.

In our view, however, the defendants have offered only minimal considerations in support of an English forum. This is not a case like *Piper* where there is an obviously better suited foreign forum for the adjudication of the dispute. *See Piper,* 454 U.S. at 238-39 (dismissal of case so that it could be litigated in Scotland, site of plane crash). Nor does it involve substantial physical evidence that is difficult or expensive to transport. *Cf., e.g., id.* at 242-43 (plane crash in Scotland); *In re Union Carbide,* 809 F.2d 195 (environmental disaster in India). For any nonparty witnesses, the inconvenience of a trial in New York is not significantly more pronounced than the inconvenience of a trial in England.

In arguing that England is a more appropriate forum, defendants rely upon arguments such as the inconvenience of shipping documents from England to the United States and the additional cost for a Nigerian witness of flying to New York rather than London. These considerations are indeed a legitimate part of the *forum non conveniens* analysis, but (a) the defendants have not demonstrated that these costs are excessively burdensome, especially in view of the defendants' vast resources, *cf. Calavo Growers of California v. Generali Belgium,* 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) ("It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit."), and (b) the additional cost and inconvenience to the defendants of litigating in New York is fully counterbalanced by the cost and inconvenience to the plaintiffs of requiring them to reinstitute the litigation in England courts—especially given the plaintiffs' minimal resources in comparison to the vast resources of the defendants. These considerations cannot justify overriding the plaintiffs' choice of forum.

Defendants argue that England has a public interest in adjudicating this action. In particular, they argue that (1) Shell Transport is a British corporation whose liability for the actions of its subsidiary is likely to be governed by British law; and (2) Nigeria was at the time of the actions in question a member of the Commonwealth of Nations. Although these factors do bear consideration, they are not overriding. To the same extent that England may have an interest in adjudicating matters affecting a British corporation, the United States courts have an interest in adjudicating matters affecting its residents. Also, while one defendant is a British corporation whose actions are governed by British law, the second defendant is not British, but Dutch. The fact that Nigeria was at the time a member of the voluntary consortium of nations constituting the Commonwealth is of no particular significance.

In order to be granted dismissal based on *forum non conveniens,* the defendants bear the burden of establishing that the *Gilbert* factors "tilt[ ] strongly in favor of trial in the foreign forum." *R. Maganlal & Co.*, 942 F.2d at 167. We believe they have failed as a matter of law to meet this burden. The factors weighing against dismissal include (1) the substantial deference courts are required to give to the plaintiff's choice of forum, (2) the enormous burden, expense, and difficulty the plaintiffs would suffer if required to begin the litigation anew in England,[13] (3) the policy favoring our court's retention of such

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[13] As the Magistrate Judge noted in his report, the plaintiffs lack meaningful financial resources and will be substantially burdened by the expense of bringing this litigation in England. Nonetheless, he concluded that the plaintiffs' lack of resources is a "neutral factor" because the plaintiffs have not established that it will be less expensive to try the case in New York than in England. The record, however, contains substantial evidence that trial in New York will be less expensive and burdensome for the plaintiffs. The plaintiffs have already obtained excellent pro bono counsel to litigate this matter in the courts of the United States; there is no guarantee that they will be able to obtain equivalent representation in England without incurring substantial expenses. Two of the plaintiffs lived in the United States when the action was brought. The cost and difficulties of relocating

suits brought by plaintiffs who are residents of the United States, and (4) the policy expressed in the TVPA favoring adjudication of claims of violations of international prohibitions on torture. These factors are more than sufficient to overcome the defendants' weak claim for dismissal based on *forum non conveniens.*[14]

We therefore remand to the district court for further proceedings. Because the district court dismissed for *forum non conveniens,* it never considered the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[15] We remand for consideration of that motion.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing for *forum non conveniens* is REVERSED, and the case is REMANDED for further proceedings.

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themselves to England for the duration of the litigation is likely to be onerous. Finally, the plaintiffs and their attorneys have already made substantial investments of time, money, and energy in pursuing this litigation in the U.S. courts. Requiring the plaintiffs to replicate them in the British courts would substantially increase their burden. For these reasons, we believe that the Magistrate Judge should have given greater consideration to the burden on the impecunious plaintiffs, rather than focusing his consideration of the convenience factors almost entirely on the convenience of the defendants.

[14] The other considerations favoring retention of jurisdiction sufficiently outweigh the defendants' claim for dismissal that we would reach the same result without consideration of the policy interest we have found to be expressed by the TVPA.

[15] Defendants also urged below that the Netherlands was an adequate alternative forum and more convenient than the United States. Although the district court did not rule on the defendants' request for dismissal in favor of a Dutch forum, we need not remand for consideration of this question, because dismissal in favor of trial in the Netherlands would share the disadvantages that have led us to reject the dismissal in favor of trial in England.

APPENDIX B

ORDER OF UNITED STATES DISTRICT JUDGE KIMBA M. WOOD, FILED SEPTEMBER 25, 1998 (UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, Individually and as Executor of his deceased father KEN SARO-WIWA, and OWENS WIWA and BLESSING KPUINEN, Individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Plaintiffs,

-against-

ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, p.l.c.,

Defendants.

96 Civ. 8386 (KMW) (HBP)

ORDER

WOOD, U.S.D.J.:

In a Report and Recommendation dated March 31, 1998 (the "Report"), Magistrate Judge Henry Pitman recommended that the Court grant defendants' motion to dismiss (1) under Federal Rule of Civil Procedure 12(b)(1) for lack of personal jurisdiction and (2) pursuant to the doctrine of forum non conveniens. Both parties filed timely objections to those portions of the Report with which they disagreed. Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), the Court reviews de novo those aspects of the Report to which the parties object. Because the Court concludes that personal jurisdiction is appropriate in New York, the Court reaches a different conclusion than the Report on that issue. However, the Court adopts and accepts the Report in

concluding that defendants' motion to dismiss should be granted for forum non conveniens.

I. Background

A. Plaintiffs' Claims

Plaintiffs have alleged the involvement of defendants in human rights violations in Nigeria from 1990 to 1995. According to the Amended Complaint, plaintiffs and their decedents protested oil exploration and development activity by defendants' affiliated companies in the Ogoni region of Nigeria. (Am. Comp. ¶¶ 29, 32, 41, 46.) As a result, plaintiffs contend, defendants and their affiliates conspired with the Nigerian government in committing a host of human rights violations. (Id. ¶¶ 33, 35-45.)

The human rights violations alleged by plaintiffs include the beating and shooting of plaintiff Jane Doe (id. ¶ 43), the repeated arrest, detention, torture, illegal conviction, and execution of Ken Saro-Wiwa and John Kpuinen (id. ¶¶ 47, 66-69, 72, 74, 75, 81-83), and the beating of Saro-Wiwa's family when they attended Saro-Wiwa's trial (id. ¶ 73). Plaintiff Owen Wiwa further alleges that he fled Nigeria because he feared arrest, torture, and execution. (Id. ¶¶ 84-85.) Plaintiffs seek damages for: summary execution; crimes against humanity; torture; cruel, inhuman and degrading treatment; arbitrary arrest and detention; violations of the rights to life, liberty, security of the person and peaceful assembly and association; wrongful death; assault and battery; intentional infliction of emotional distress; negligence; and violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO"). (See Report at 4.)

B. Facts Relevant to Jurisdiction

The following facts, agreed to by both parties, form the basis for the present controversy over personal jurisdiction. Royal Dutch and Shell Transport are foreign holding companies that engage in no operational activities. (See Report

at 6.) These two companies own, directly or indirectly, three holding companies: Shell Petroleum N.V., a Dutch corporation; The Shell Petroleum Company Limited, an English corporation; and Shell Petroleum Inc. ("SPI"), a Delaware corporation. (See id. at 6-7.) SPI, in turn, owes all the shares of Shell Oil company, a Delaware corporation. (See id. at 7.) The crux of the issue is whether SPI, through its wholly owned subsidiary Shell Oil, may be subject to personal jurisdiction in this Court.

The fact upon which plaintiffs' assertions of personal jurisdiction rest is that the defendants operate an "Investor Relations Program" in the United States with the assistance of Mr. James Grapsi ("Grapsi"). (See id. at 8.) Grapsi, employed by Shell Oil as Manager of Investor Relations, provides the following services for defendants:

- provides information to the shareholders of Royal Dutch and Shell Transport (see Deposition of James Grapsi, July 21, 1997, Pl. Exh. A ("Grapsi Dep."), at 6);
- responds to telephone calls from investors or potential investors (see id. at 7-8);
- organizes approximately six meetings a year between investors and officers/employees of defendants, in cities such as New York, Philadelphia, Chicago, and Houston (see id. at 7, 14, 29-67);
- sends out financial information to persons on a mailing list prepared for Shell Oil, and to any other person who requests it (see id. at 7-11).

Grapsi's office is located in New York. (See id. at 97.) Defendants reimburse Shell Oil for the expenses connected with Grapsi's services, including rent, electricity, salary, expenses, and meeting and mailing costs. (See id. at 18-21.) The total monthly cost of Grapsi's services is less than

$45,000. (See id. at A-2.) Plaintiffs contend that these activities suffice to allow personal jurisdiction over defendants.

II. Discussion

A. Rule 12(b)(1) Standard

In evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), plaintiff bears the burden of establishing personal jurisdiction. Prior to an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction. See Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990). In the present case, however, plaintiffs have had discovery on the issue of personal jurisdiction; thus plaintiffs' showing "'must include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant.'" Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996) (quoting Ball, 902 F.2d at 197).

B. Jurisdiction Under Rule 4(k)(1)(A)

Under Federal Rule of Civil Procedure 4(k)(1)(A), service of process and personal jurisdiction are proper wherever a court of general jurisdiction in the state in which the district court is located exercises jurisdiction. Under New York law, personal jurisdiction over a foreign corporation exists when that corporation is "doing business" in the state. See Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985). Plaintiffs claim that defendants are doing business in New York by virtue of their own activities or by virtue of the activities of their agent James Grapsi.

1. Whether Defendants Are "Doing Business" Through Their Own Activities

The Report correctly rejects plaintiffs' contention that personal jurisdiction over defendants is proper by virtue of defendants' own activities in New York. For defendants'

conduct to give rise to jurisdiction, it must constitute a "continuous and systematic course of doing business here." Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 43 (1967). Evidence of such contact would include "the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state, and the presence of employees of the foreign party in the state." First American Corp. v. Price Waterhouse LLP, 988 F. Supp. 353, 362 (S.D.N.Y. 1997).

The contacts plaintiffs cite are not substantial. The contacts upon which plaintiffs rely, beyond the presence of James Grapsi, are that defendants' stock is traded on the New York Stock Exchange, that defendants maintain a site on the Internet accessible from New York, and that defendants are involved in litigation in New York. The Report notes the overwhelming authority that suggests that the trading of a company's stock is insufficient to establish jurisdiction. (See Report at 15-16.) The argument that defendants maintain a Web site accessible in New York is likewise unavailing; many Web sites are accessible from anywhere in the world. See Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S. D. N. Y. 1996) , aff'd, 126 F. 3d 25 (2d Cir. 1997). Finally, in the litigation cited by plaintiffs, defendants have preserved their jurisdictional objections. (See Report at 17.)

Plaintiffs' objection to the Report on this issue is that although none of the individual contacts taken alone may suffice to establish personal jurisdiction, the aggregate of these contacts does suffice. (See Pl. Obj. at 9-11.) Plaintiffs fail to explain, however, why the sum of jurisdictionally insignificant facts should confer jurisdiction.

2. Whether Defendants Are Doing Business Through Grapsi

The "more difficult problem," (see Report at 19), in this case is whether personal jurisdiction over defendants is proper

because of the actions of their agent James Grapsi. This is indeed a close question, and one which the Court answers slightly differently from the Report.

Jurisdiction may be proper under an agency theory of jurisdiction. See Palmieri v. Estefan, 793 F. Supp. 1182, 1187 (S.D.N.Y. 1992); Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 67 (S.D.N.Y. 1979). Under Bellomo v. Pennsylvania Life Co., 488 F. Supp. 744 (S.D.N.Y. 1980), a subsidiary created by the parent to carry on business on its behalf subjects the parent to jurisdiction. See id. at 746. As noted in the Report, all of Grapsi's expenses are paid by defendants, who would not be paying almost half a million dollars per year were his services not of significant value to defendants. (See Report at 19-20.) A reasonable inference to be drawn from this arrangement is that Grapsi provides services important to defendants that defendants would otherwise have to perform themselves. See General Electric Co v. Circle Air Freight Corp., 1997 WL 129400, at *9 (S.D.N.Y. Mar. 20, 1997) (citing Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967)). On this basis, the Report applied the analysis of Frummer, 19 N.Y.2d 533, to conclude that Grapsi can be considered an agent of defendants. (See Report at 19-20.)

As Grapsi is an agent of defendants, the question becomes whether he was "doing business" in this forum. The Report concludes that Grapsi's activities were limited to investor relations, and that advertising and soliciting business alone is not enough to confer jurisdiction. (See Report at 22.) However, Grapsi did not simply conduct advertising or solicit business on defendants' behalf, see, e.g., Schenck v. Walt Disney Co., 742 F. Supp. 838, 842 (S.D.N.Y. 1990), but served as a constant presence in New York to promote defendants' interests. In this respect, Grapsi's conduct may be characterized as "solicitation plus." The Second Circuit has explained in Landoil Resources Corp. v. Alexander & Alexander Serv., 918 F.2d 1039 (2d Cir. 1990), that in determining personal jurisdiction, "'once

solicitation is found in any substantial degree very little more is necessary to a conclusion of "doing business."'" Id. at 1044 (quoting Aquascutum of London, Inc. v. S.S. American Champion, 426 F.2d 205, 211 (2d Cir. 1970)). In Landoil, the Court ruled that periodic business trips did not establish jurisdiction, but explained in a footnote that "renting a hotel room to solicit business on a systematic and regular basis might be the functional equivalent of an office in New York and therefore might be sufficient to establish presence within the state." Id. at 1045 n.10. The office maintained by defendants and staffed by Grapsi provides the "physical corporate presence," Artemide SpA v. Grandlite Design & Mfg. Co., 672 F. Supp. 698, 703 (S.D.N.Y. 1987), required for jurisdictional purposes. In Lane v. Vacation Charters, Ltd., 750 F. Supp. 120 (S.D.N.Y. 1990), the court found that personal jurisdiction was lacking because the defendant, a ski resort, merely advertised in New York. See id. at 123-24. However, the court emphasized that, "Perhaps the most important factor needed for a finding of jurisdiction under CPLR § 301 is the in-state presence of employees engaged in business activity." Id. at 125. Grapsi's continuous in-state presence, coupled with his solicitation and organizational efforts on defendants' behalf, confers personal jurisdiction over defendants.

The Report found it significant that Grapsi never sold or offered to sell the stock of the defendants, and as a result did not directly affect the finances of defendants. (See Report at 21.) This distinction appears to have some merit. Several decisions suggest that the inability of the agent to bind his or her company counsels against a finding of "doing business." See Gelfand, 385 F.2d at 121 (jurisdiction proper where agent could make and confirm reservations); Palmieri, 793 F. Supp. at 1192 (jurisdiction proper where agent could contract with musical acts); Schenck, 742 F. Supp. at 842 (no jurisdiction because agent could not "perform services that can contractually bind" defendant); Frummer, 19 N.Y.2d at 537 (jurisdiction proper where agent could confirm reservations).

However, in light of the Second Circuit's instruction to require little beyond solicitation, see Landoil, 918 F.2d at 1044, the Court declines to rely on the distinction suggested in the Report.

3. Jurisdiction Under Rule 4(k)(2)

For the reasons stated in the Report, the Court concludes that plaintiffs have not shown that jurisdiction would be proper under Federal Rule of Civil Procedure 4(k)(2). Jurisdiction under Rule 4(k)(2) requires three elements: first, that plaintiff's cause of action arise under federal law; second, that the defendant is not subject to the jurisdiction of the courts in any one state; and third, that the defendant's total contacts with the United States as a whole suffice to confer jurisdiction without offending due process. See Aerogroup Int'l Inc. v Marlboro Footworks, Ltd., 956 F. Supp. 427, 434 (S.D.N.Y. 1996). Even assuming that plaintiffs satisfy the first two prongs of this test, as the Report did, (see Report at 25-26), the analysis of Metropolitan Life, 84 F.3d 560, is dispositive on the third requirement.

In Metropolitan Life, the defendants' contacts included $4 million in sales into the state over four years, the filing of state income and sales tax returns in the state, contracts with dealers and building companies in the state, distributing product support and training manuals, and over 100 visits by employees and engineers. See id. at 570. These contacts were in addition to maintenance of a resident employee and advertising and solicitation of business, which is all that exists in the present case. The court concluded that while jurisdiction was proper, it was a "close case." Id. at 572. If the business contacts in Metropolitan barely sufficed for jurisdictional purposes, then the "minimum contacts" required by the Due Process Clause are absent in this case. For the same reason, plaintiffs' claim that jurisdiction is proper under RICO also fails. See PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998) ("[A] civil RICO action can only be brought in a district

court where personal jurisdiction based on minimum contacts is established as to at least one defendant.").

C. Forum Non Conveniens

For the reasons stated in the Report, the Court adopts the Recommendation that this case be dismissed for forum non conveniens. The Court must examine "the availability of an alternative forum, the private interests of the parties, and the public interest in forum selection." United Can, 138 F.3d at 73 (citing R. Maganlal & Co. v. M.G. Chem. Co., 942 F. 2d 164, 167 (2d Cir. 1991)). Plaintiffs rely on Chase Manhattan Bank v. Banque Generale du Commerce, 1997 WL 266968, at *3 (S.D.N.Y. May 20, 1997), to suggest that plaintiffs' choice of forum is favored, but Chase is distinguishable in that jurisdiction in Chase arose from a transaction that occurred in New York. See id. at *1.

First, England appears to be an adequate alternative forum in which to conduct the present litigation. The Report provides extensive analysis of the suitability of English courts to address plaintiffs' claims. (See Report at 39-42.) Plaintiffs assert that English law "preclude[s] plaintiffs' claims altogether." (Pl. Obj. at 20.) This claim is not supported by the statement of their expert, who explains that the law may be more favorable in the United States because such litigation in England would involve a "very difficult path, likely failure, . . . [and] low prospects of success." (Second Declaration of Peter Duffy, May 5, 1998, Pl. Exh. 2, at ¶ 5.) Plaintiffs' expert also explains that a conditional fee arrangement, which would be necessary were an English law firm to take the case, would be "less attractive," (Declaration of Richard Meeran, Pl. Exh. 3, at ¶ 13(a)), than a similar arrangement in the United States. Yet this is very different from the conclusion that it is "inconceivable" that an English attorney could take the case, (id. at ¶ 14), nor does it rule out the possibility that plaintiffs' current attorneys could continue to work on the case with local counsel.

The Supreme Court has explained that, "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1982). Similarly, this Court has ruled that, "[t]he test of whether an alternative forum for the litigation exists does not hinge upon plaintiff's prediction of the outcome of the case in the alternative forum under consideration." Monsanto Int'l Sales Co. v. Hanjin Container Lines, Ltd., 770 F. Supp. 832, 838 (S.D.N.Y.), modified, 1991 WL 210951 (S.D.N.Y. Oct. 8, 1991), aff'd, 962 F.2d 4 (2d Cir. 1992). Nor should the asserted difference in the nature and type of remedy available to plaintiffs be confused with no remedy at all. See United Can, 138 F.3d at 74 ("The district court was obliged to discern whether the laws enforceable in [the alternative forum's] courts were an adequate, not identical, alternative.").

Second, the Report correctly weighs the private interest factors in reaching its conclusion that England would be a better forum for this litigation. The bulk of the documents necessary for litigation are in England, and "[i]ssues with respect to document production usually must be pursued at the source." See PT United Can Co. v. Crown Cork & Seal Co., 1997 WL 31194, at *7 (S.D.N.Y. Jan. 28, 1997), aff'd, 138 F.3d 65 (2d Cir. 1998). Equally important, plaintiffs do not allege that any of their witnesses or defendants' witnesses are present in this jurisdiction. It seems that only two plaintiffs reside in the United States, neither in the Southern District of New York. (See Pl. Obj. at 26.) Moreover, the decision plaintiffs cite to establish that public interest factors weigh in favor of the present forum, Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996), involved a plaintiff who lived in New York. Surprisingly, plaintiffs' attorney commented at oral argument before the Magistrate Judge that, "[I]t is true that in some sense the choice of New York over some other jurisdiction within the United States is not particularly relevant. I mean, we can't say that New York has a closer connection to

the events in Nigeria than, let's say, a court in the Third Circuit." Pl. Obj. Exh. 1, at 46. Thus, private interest factors weigh against plaintiffs' current choice of forum.

Third, public interest factors strongly advise against trial in this district. The questions presented by this case implicate significant and weighty issues. Yet, as the Report correctly points out, none of the parties to this action is a citizen of the United States, there is no allegation that defendants' actions had an effect on the United States, and the conduct at issue was engaged in by an English corporation, in a nation formerly part of the Commonwealth of Nations, under a liability standard determined by English law. (See Report at 50-53.) The ends of justice are better served by litigating this case in a forum more closely connected to the parties in the case. Accordingly, the Court finds that the ends of justice will be served by trial before an English court.

III. Conclusion

For the reasons stated above and the reasons stated in the Report, the Court grants defendants' motion to dismiss on the ground of forum non conveniens. [Docket No. 7] The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: New York, New York
September 25, 1998

/s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this Order have been mailed to counsel for the parties.

APPENDIX C

ORDER OF UNITED STATES DISTRICT JUDGE KIMBA M. WOOD, FILED JANUARY 20, 1999 (UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, Individually and as Executor of his deceased father KEN SARO-WIWA, and OWENS WIWA and BLESSING KPUINEN, Individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE, Plaintiffs, -against- ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, p.l.c., Defendants.	96 Civ. 8386 (KMW) (HBP) ORDER

WOOD, U.S.D.J.:

In an Order dated September 25, 1998, the Court adopted in part a Report and Recommendation of Magistrate Judge Henry Pitman (the "Report"), and held that defendants' motion to dismiss this action for forum non conveniens should be granted (the "1998 Order"). Plaintiffs now move for reconsideration pursuant to Local Civil Rule 6.3 and Federal Rule of Civil Procedure 59. For the reasons stated below, the Court denies in part and grants in part plaintiffs' motion for reconsideration.

I. Discussion

The standard for reconsideration is strict. Local Civil Rule 6.3 allows a party to seek reconsideration based on "matters or controlling decisions which counsel believes the court has overlooked." The court should reconsider its prior order where:

> (1) "the court has overlooked controlling decisions that may have influenced the earlier result had they been considered by the court," or
>
> (2) "the court failed to consider 'factual matters that were put before the court on the underlying motion.'"

Travelers Ins. Co. v. Buffalo Reinsurance Co., 739 F. Supp. 209, 211 (S.D.N.Y. 1990) (citations omitted); see also Shrader v. CSX Transp., Inc., 70 F. 3d 255, 257 (2d Cir. 1995) (reconsideration is appropriate where the "moving party can point to controlling decisions or data that the court overlooked"). However, the standard on a motion for reconsideration is "'strict in order to dissuade repetitive arguments on issues that have already been considered fully by the court.'" Travelers, 739 F . Supp. at 211 (quoting Caleb & Co. v. E.I. DuPont de Nemours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1985)); see also Shrader, 70 F.2d at 257.

Plaintiffs raise two claims in support of their present motion. First, plaintiffs argue that the Court should have imposed certain conditions on the dismissal to insure that plaintiffs are presented with an adequate opportunity to litigate this case in the English courts. Defendants have already agreed to these conditions, which Magistrate Judge Pitman described in his Report as follows:

> if dismissal on forum non conveniens is granted, they will consent to service of process, comply with all applicable discovery rules, consent to pay any judgment rendered, waive any security bond that might be required and waive any statute of limitations defense if the action is committed within one year of the final disposition of this matter.

(Report at 39-40.) In its 1998 Order, the Court adopted this portion of the Report and Recommendation. (See 1998 Order at 12.) Defendants are therefore bound by their concessions. Although imposing these conditions on the Court's dismissal

is not strictly necessary in light of defendants' concessions, it is appropriate to insure that following a dismissal on the ground of forum non conveniens, defendants remain amenable to suit in the alternate jurisdiction. See Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998) (citing In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 203-04 (2d Cir. 1987)).

Accordingly, the Court imposes the following conditions on its dismissal for forum non conveniens: that defendants consent to service of process, comply with all applicable discovery rules, consent to pay any judgment rendered, waive any security bond that might be required and waive any statute of limitations defense if the action is committed within one year of the final disposition of this matter.

Plaintiffs also ask the Court to impose substantive conditions on its dismissal, arguing that the Court must condition dismissal upon defendants' waiving certain defenses under English law. This request, however, runs afoul of a basic principle of forum non conveniens law cited in the 1998 Order: "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantive weight in the forum non conveniens inquiry." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1982). Imposing conditions relating to substantive law upon dismissal for forum non conveniens would entirely undercut the force of this principle. None of the cases cited by plaintiffs is to the contrary. Instead, plaintiffs rely on cases in which the court sought to ensure that defendants would remain amenable to suit even after the case was dismissed to another forum. Appropriate subjects of dismissal conditions would include consent to service of process, see, e.g., Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 881 (2d Cir. 1978); consent to payment of judgment, see, e.g., Calavo Growers of California v. Generali Belgium, 632 F.2d 963, 968 (2d Cir. 1980); and waiver of the statute of limitations, see, e.g., Sussman v. Bank of Israel, 56 F.3d 450, 454 (2d Cir. 1995). Plaintiffs fail to present a case in which one

of the conditions of dismissal involved a waiver of a substantive legal defense.

Furthermore, plaintiffs have failed to show that the English legal doctrines in question would deny them relief altogether. The 1998 Order noted that, "[t]he test of whether an alternative forum for the litigation exists does not hinge upon plaintiff's prediction of the outcome of the case in the alternative forum under consideration." Monsanto Int'l Sales Co. v. Hanjin Container Lines, Ltd., 770 F. Supp. 832, 838 (S.D.N.Y.), modified, 1991 WL 210951 (S.D.N.Y. Oct. 8, 1991), aff'd, 962 F.2d 4 (2d Cir. 1992). On their motion for reconsideration, plaintiffs again offer only predictions. (See Pl. Mem. at 3 (arguing that the English Act of State doctrine "may preclude plaintiffs' claims from being heard"); id. at 4 (arguing that the double actionability doctrine "would potentially deprive plaintiffs of a forum"); id. (arguing that the transmissability doctrine "may preclude these plaintiffs from bringing suit in England")) (emphasis added). For these reasons, the Court declines to impose conditions upon its dismissal related to substantive English law.

The second argument plaintiffs present in their motion for reconsideration is that dismissal for forum non conveniens is inappropriate in light of the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"). Yet this argument confuses the jurisdictional analysis, which the Court resolved in plaintiffs' favor even without reference to ATCA, with the forum non conveniens analysis. ATCA confers "original jurisdiction of any civil action by an alien"; it does not impose any requirement as to the forum in which the action is to be heard. Plaintiffs contend that the Court misinterpreted Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996), by wrongly focusing on the fact that "plaintiffs are not United States citizens. Order at 15. However, plaintiffs in an ATCA claim will necessarily be non-citizens." (Pl. Mem. at 7-8.) This argument again confuses the jurisdictional analysis with the forum non conveniens analysis. The Court attached

significance to the fact that the plaintiff in Cabiri was a New York resident, regardless of his citizenship. (See Order at 14-15.) Plaintiffs, in contrast, have not shown that any plaintiff or witness resides in this district.

Finally, the Second Circuit has declined to endorse the argument that the forum non conveniens inquiry must be conducted differently in the case of ATCA claims. See Jota, 157 F.3d at 159 n.6. In one of the few cases in which the Second Circuit weighed the propriety of a forum non conveniens dismissal in an ATCA action, see Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), the alternate fora were the courts of war-torn Bosnia and Serbia, unquestionably inferior fora. Because plaintiffs have not shown that the English courts are inferior fora, plaintiffs' contention on this point is without force.

II. Conclusion

For the reasons stated above, the Court grants in part and denies in part plaintiffs' motion for reconsideration. The Court grants plaintiffs' motion solely to the extent that it imposes the following conditions on its dismissal for forum non conveniens: that defendants consent to service of process, comply with all applicable discovery rules, consent to pay any judgment rendered, waive any security bond that might be required and waive any statute of limitations defense if the action is committed within one year of the final disposition of this matter.

The Clerk of Court is directed to close this case. All pending motions are moot.

SO ORDERED.

Dated: New York, New York
January 20, 1999

/s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this Order have been mailed to counsel for the parties.

APPENDIX D

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE HENRY B. PITMAN, FILED MARCH 31, 1998 (UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, individually and as Executor of his deceased father KEN SARO-WIWA, and OWENS WIWA and BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE, Plaintiffs, -against- ROYAL DUTCH PETROLEUM COMPANY and SHELL TRANSPORT AND TRADING COMPANY, p.l.c., Defendants.	96 Civ. 8386 (KMW) (HBP) REPORT AND RECOMMEN-DATION

PITMAN, United States Magistrate Judge:

TO THE HONORABLE KIMBA M. WOOD, United States District Judge,

I. Introduction

Defendants Royal Dutch Petroleum Company ("Royal Dutch") and Shell Transport and Trading Company, p.l.c., ("Shell Transport") move to dismiss the First Amended Complaint ("Amended Complaint") for lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a claim on which relief can be granted, pursuant to sub-paragraphs 1, 2 and 6 of Rule 12(b), Fed.R.Civ.P. Defendants also move to dismiss pursuant to the doctrine of forum non conveniens. For the reasons set forth below, I respectfully recommend that defendants' motion be granted for lack of personal jurisdiction or, in the alternative, pursuant to

the doctrine of forum non conveniens. I express no opinion concerning the other grounds asserted by defendants.

II. Facts

A. The Allegations of the First Amended Complaint

This action arises out of alleged human rights violations in Nigeria during the period from 1990 through 1995.

As set forth in the Amended Complaint, plaintiffs and their decedents were active in protesting oil exploration and development activity by defendants' affiliated companies[1] in the Ogoni region of Nigeria; according to plaintiffs, these activities have had profoundly damaging ecological effects in the region (Amended Complaint ¶¶ 29, 32, 41, 46). Plaintiffs allege that their lawful protests were suppressed by a host of human rights violations committed by agents of the Nigerian government either in conspiracy with defendants and their affiliates or at their request (Amended Complaint ¶¶ 33, 35-45).

Specifically, plaintiffs allege that (1) plaintiff Jane Doe was beaten and shot in April, 1993 while protesting the destruction of her property (Amended Complaint ¶ 43), (2) Ken Saro-Wiwa was arrested and detained in April and June, 1993 (Amended Complaint ¶ 47), (3) Saro-Wiwa and John Kpuinen were arrested and detained in May, 1994, for eight months without any charges being filed (Amended Complaint

[1] In their memorandum of law in opposition to defendants' motion, plaintiffs admit that both Royal Dutch and Shell Transport are holding companies and that the sole business activity of each is investments (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint, dated August 31, 1997 ("Plaintiffs' Memo.") at 2-3; Declaration of Jyoti Munsiff, dated March 24, 1997 ("Munsiff Dec.") at ¶ 3; Declaration of Robert van der Vlist, dated March 25, 1997 ("van der Vlist Dec.") at 3).

¶¶ 66-68)[2] and (4) Saro-Wiwa and Kpuinen were subsequently tried by an illegally-constituted military tribunal, falsely convicted of murdering four Ogoni tribal leaders and executed (Amended Complaint ¶¶ 69, 72, 81, 83). Plaintiffs further allege (1) that Saro-Wiwa's elderly mother and other family members were beaten when they attended Saro-Wiwa's trial (Amended Complaint ¶ 73), (2) that while incarcerated, Saro-Wiwa and Kpuinen were denied adequate food and medical care and were beaten and subjected to torture (Amended Complaint ¶ 74), (3) that the convictions of Saro-Wiwa and Kpuinen were brought about through defendants' bribes to "key witnesses" (Amended Complaint ¶ 75) and (4) that Saro-Wiwa and Kpuinen were again beaten and denied food, water and bedding in the days preceding their execution (Amended Complaint ¶ 82). Plaintiffs also allege that plaintiff Owens Wiwa, who had previously been arrested and detained without charges, left his medical practice and fled Nigeria after his father's execution because he feared arbitrary arrest, torture and execution (Amended Complaint ¶¶ 84-85).

As a result of the foregoing, plaintiffs seek damages for: (1) summary execution; (2) crimes against humanity; (3) torture; (4) cruel, inhuman and degrading treatment; (5) arbitrary arrest and detention; (6) violations of the rights to life, liberty, security of the person and peaceful assembly and association; (7) wrongful death; (8) assault and battery; (9) intentional infliction of emotional distress; (10) negligent infliction of emotional distress; (11) negligence and (12) violation of the Racketeer Influenced and Corrupt Organizations Act.

B. Proceedings to Date

This action was commenced on November 8, 1996. Although plaintiffs have not filed proof of service, it appears

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[2] The Amended Complaint does not state what Saro-Wiwa's status was between his 1993 and 1994 arrests.

that the summons and complaint were served on Royal Dutch and Shell Transport in the Netherlands and the United Kingdom, respectively, in March, 1997. Defendants filed a motion to dismiss the original complaint on March 28, 1997, asserting the same grounds asserted in the pending motion.

After holding a conference call with counsel for all parties, I entered a Scheduling Order on April 9, 1997, permitting discovery to proceed on all factual issues raised in the then-pending motion and directing that all such discovery be completed on or before June 23, 1997.

Plaintiffs served and filed the Amended Complaint on or about April 29, 1997, and on May 21, defendants filed the pending motion seeking dismissal of the Amended Complaint on the same grounds as were previously asserted. The parties stipulated that plaintiffs' opposition to this motion would be served and filed by August 29, 1997 and that defendants' reply would be served and filed by September 29, 1997. The parties also agreed to continue discovery concerning the factual issues raised by the pending motion through August, 1997.[3]

Oral argument on the pending motion was heard on December 5, 1997.

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[3] By Order dated August 20, 1997, I denied plaintiffs' application to extend discovery further.

III. Analysis

A. Personal Jurisdiction[4]

1. Facts Relevant to the Determination of Personal Jurisdiction

The following facts are not in dispute. Royal Dutch and Shell Transport are foreign holding companies that engage in no operational activities (Plaintiffs' Memo. at 2-3). They own, directly or indirectly, three holding companies: Shell Petroleum N.V., a Dutch corporation, The Shell Petroleum Company Limited, an English corporation, and Shell Petroleum Inc. ("SPI"), a Delaware corporation (van der Vlist Dec. ¶ 5). SPI, in turn, owns all the shares of Shell Oil Company ("Shell Oil") which is also a Delaware corporation (Plaintiffs' Exhibit B-2 at 0001462).

It is also undisputed that, at all times relevant, neither Royal Dutch nor Shell Transport:

a) had an office, employee, postal address or telephone listing in the United States;

b) had been licensed or applied for a license to do business in any state or territory of the United States;

c) had or have been required to have a designated agent for service of process in the United States;

d) owned, used or possessed any real property in the United States;

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[4] Since defendants' assertion that subject matter jurisdiction is lacking is based on plaintiffs' putative failure to state a claim under the Alien Tort Claims Act, see Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir.), cert. denied, 116 S.Ct. 2524 (1996), it appears that the correct order in which to analyze defendants' motion is (1) personal jurisdiction, (2) venue and (3) the adequacy of the Amended Complaint. See Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (en banc).

e) contracted to supply goods or services in the United States;

f) maintained any bank accounts or other property in the United States.

(van der Vlist Dec. ¶ 6; Munsiff Dec. ¶ 5).

There is also no dispute that the shares or Royal Dutch and American Depository Receipts ("ADRs"), representing shares of Shell Transport, are traded on the New York Stock Exchange (van der Vlist Dec. ¶ 6; Munsiff Dec. ¶ 5; Munsiff Dep. at 29-30). Incidental to this trading, defendants have made certain filings with the Securities and Exchange Commission and have hired independent contractors to act as either transfer agents or depositories for shares and ADRs and to provide financial information to shareholders, financial analysts and other interested parties (Plaintiffs' Memo. at 26-29; van der Vlist Dep. at 17).

The defendants also conduct an "Investor Relations Program" in the United States with the assistance of Mr. James Grapsi. Grapsi is employed by Shell Oil as the Manager of Investor Relations and provides information to the shareholders of Royal Dutch and Shell Transport (Grapsi Dep. at 6). Grapsi responds to telephone calls from investors or potential investors, organizes meetings between investors and officers/ employees of defendants and sends out financial information to persons on a mailing list prepared for Shell Oil and to any other person who requests it (Grapsi Dep. at 7-11). All the expenses connected with Grapsi's services -- salary, rent, electricity, out-of-pocket expenses for meetings and mailing costs -- are reimbursed to Shell Oil by defendants (Grapsi Dep. at 18-21). The monthly cost to defendants for Grapsi's services is less than $45,000 (Grapsi Dep. Ex. A-2). Grapsi arranges a total of approximately six meetings per year in the United States (Grapsi Dep. at 7, 14, 29-67).

Royal Dutch also maintains a site on the Internet (Pl. Exhibit A-1).

2. Legal Analysis of Jurisdictional Issues

In ruling on a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing jurisdiction over the defendants. Prior to an evidentiary hearing, the plaintiff need only make a prima facie showing of personal jurisdiction. Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990). Where, as here, plaintiffs have had discovery on jurisdictional issues, "the plaintiff[s'] prima facie showing 'must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant.'" General Electric Co. v. Circle Air Freight Corp., 92 Civ. 6333 (KMW), 1997 WL 129400 at *7 (S.D.N.Y. March 20, 1997). Accord Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996). Pleadings and affidavits must be viewed in the light most favorable to plaintiffs, and all doubts must be resolved in plaintiffs' favor. Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985); Pyramyd Stone Int'l Corp. v. Crosman Corp., 95 Civ. 6665 (JFK), 1997 WL 66778 at *3 (S.D.N.Y. Feb. 18, 1997).

Since plaintiffs invoke the Court's jurisdiction on theories other than diversity of citizenship[5], two alternative provisions of Rule 4(k) of the Federal Rules of Civil Procedure provide

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[5] Plaintiffs claim federal jurisdiction exists by virtue of their claims under RICO, 18 U.S.C. § 1964(c), and the Alien Tort Claims Act, 28 U.S.C. § 1350.

the standards by which the jurisdiction of the Court is to be measured:

> **(k) Territorial Limits of Effective Service**
>
> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
>
> (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located . . . .
>
> (2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Since jurisdiction under Rule 4(k)(2) requires that the defendant not be subject to the general jurisdiction of a state, Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., 956 F. Supp. 427, 434 (S.D.N.Y. 1996); Siegel, The New Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction, 152 F.R.D. 249, 252 (1994), I will first analyze jurisdiction pursuant to Rule 4(k)(1)(A).

a. Rule 4(k)(1)(A):
Jurisdiction Under State Law

Rule 4(k)(1)(A) permits service of this Court's process wherever the process of a court of general jurisdiction of New York State could be served. Thus, the initial jurisdictional inquiry is whether defendants are subject to personal jurisdiction under state law. See Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 105-10 (1987); PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997).

N.Y. C.P.L.R. § 313 provides, in pertinent part: "A person . . . subject to the jurisdiction of the courts of the state under section 301 or 302 . . . may be served with the summons without the state, in the same manner as service is made within the state . . . ." This section provides for worldwide service of process if a defendant is subject to jurisdiction under N.Y. C.P.L.R. § 301 or § 302. J.McLaughlin, Practice Commentary to N.Y. C.P.L.R. § 313 at C313:1 (McKinney 1990). Plaintiffs here claim that defendants are "doing business" within New York and that they are, therefore, subject to jurisdiction pursuant to N.Y. C.P.L.R. § 301. Hoffritz for Cutlery, Inc. v. Amajac, Ltd., supra, 763 F.2d at 58; Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 67 (S.D.N.Y. 1979) ("Where the presence of a foreign corporation is at issue, New York courts apply a 'doing business' test to satisfy the rule that a 'court may exercise such jurisdiction over persons, property, or status as it might have exercised heretofore.'")

Plaintiffs contend that defendants are doing business in New York under two theories: (1) defendants are doing business in New York by virtue of their own activities here, or (2) defendants are doing business in New York through an agent, to wit, SPI and/or Grapsi.[6] The parties do not dispute that the mere presence of a subsidiary in New York does not, without more, subject the parent to jurisdiction, even if the parent is the sole shareholder. See generally Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925).

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[6] At oral argument, counsel for plaintiffs expressly disclaimed any reliance on the theory that a parent corporation is subject to jurisdiction where its subsidiary is subject to jurisdiction if the subsidiary is so dominated by the parent as to constitute a mere department. See generally Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996); General Electric Co. v. Circle Air Freight Corp., supra, 1997 WL 129400 at *8.

The concept of "doing business" was described at length by the Court of Appeals in Hoffritz for Cutlery, Inc. v. Amajac, Ltd., supra, 763 F.2d at 58:

> [A] corporation is "doing business" and is therefore "present" in New York and subject to personal jurisdiction with respect to any cause of action, related or unrelated to the New York contacts, if it does business in New York "not occasionally or casually, but with a fair measure of permanence and continuity." Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917); accord Laufer v. Ostrow, 55 N.Y.2d 305, 449 N.Y.S.2d 456, 434 N.E.2d 692 (1982). A non-domiciliary may be served outside New York, and sued upon any cause of action, if it engages in a continuous and systematic course of doing business in New York. Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 43, 227 N.E.2d 851, 853, cert. denied, 389 U.S. 923, 88 S.Ct. 241, 19 L.Ed.2d 266 (1967); see Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951, 953 (2d Cir. 1967). Whether a corporation may be deemed to be present by virtue of its doing business in the jurisdiction depends upon the application of a "simple and pragmatic" test. Bryant v. Finnish National Airline, 15 N.Y.2d 426, 432, 260 N.Y.S.2d 625, 628-29, 208 N.E.2d 439, 441 (1965) . . . .
>
> * * *
>
> The New York courts, in applying the pragmatic test for section 301 jurisdiction, have focused upon factors including: the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign defendant in the state. See e.g., Frummer, 19 N.Y.2d at 537, 281 N.Y.S.2d at 44, 227 N.E.2d at 853; Bryant, 15 N.Y.2d at 430-31, 260 N.Y.S.2d

at 627-28, 208 N.E.2d at 441-42; see also Liquid Carriers, 375 F.2d at 953.

See also First American Corp. v. Price Waterhouse LLP, M8-85 (RWS), 1997 WL 784597 at *8 (S.D.N.Y. Dec. 17, 1997) ("The test for doing business typically is met by the following factors: the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign party in the state."); Aboud v. Rapid Rentals Inc., 97 Civ. 1742 (MGC), 1997 WL 576086 at *2 (S.D.N.Y. Sept. 17, 1997) ("In determining whether a corporation 'does business' in New York under § 301, a court should consider whether the corporation maintains offices, employees, bank accounts or other property in New York, and whether the corporation solicits business in New York.")

Judged by these standards, there can be little doubt that defendants do not "do business" in their own right in New York. There is no dispute that defendants, in their own right, do not maintain an office in New York, solicit business in New York, maintain bank accounts or other property in New York or maintain any employees in New York. Indeed, the only possible direct contacts between defendants and New York are (1) the trading of defendants' stock or ADRs on the New York Stock Exchange, (2) activities incidental to the trading of defendants' stock, (3) the maintenance of an Internet site accessible from computers in New York and (4) defendants' involvement in other litigation in the United States. None of these activities, however, are sufficient to constitute doing business.

The trading of a company's stock in New York and the related incidental activities have frequently been asserted in support of a claim that a defendant is doing business in New York and have consistently been rejected. Industrial Acoustics Co. v. Energy Servs., Inc., 93 Civ. 2865 (MBM), 1994 WL 132114 at *4 (S.D.N.Y. April 8, 1994); Celi v. Canadian

Occidental Petroleum Ltd., 804 F. Supp. 465, 468 (E.D.N.Y. 1992); Fowble v. Chesapeake & Ohio Ry. Co., 16 F.2d 504, 505 (S.D.N.Y. 1926); Clews v. Woodstock Iron Co., 44 F. 31, 32 (S.D.N.Y. 1890); Freeman v. Bean, 266 N.Y. 657, 657-58, 195 N.E. 368, 368 (1935); Sunrise Lumber Co. v. Homer D. Biery Lumber Co., 195 A.D. 170, 173, 185 N.Y.S. 711, 713 (2d Dep't 1921); Grossman v. Sapphire Petroleum Ltd., 195 N.Y.S.2d 851, 852-53 (Sup. Ct. Kings Co. 1959); Cotugno v. Union Pacific R.R. Co., 12 Misc. 2d 235, 236, 177 N.Y.S.2d 126, 128 (Sup. Ct. Queens Co. 1958); Robbins v. Ring, 9 Misc. 2d 44, 45, 166 N.Y.S.2d 483, 484-85 (Sup. Ct. N.Y. Co. 1957); Joseph Walker & Sons v. Lehigh Coal & Navigation Co., 8 Misc. 2d 1005, 1006-07, 167 N.Y.S.2d 632, 633-34 (Sup. Ct. N.Y. Co. 1957); Worthy v. Louisville & N.R.R. Co., 79 N.Y.S.2d 588, 590 (Sup. Ct. N.Y. Co. 1948), aff'd, 276 A.D. 1068, 96 N.Y.S.2d 489 (1st Dep't 1950). Plaintiffs cite no authority to the contrary, and my own research has revealed none.

Defendants' site on the Internet is also insufficient, as a matter of law, to sustain a finding of doing business. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), aff'd, 126 F.3d 25 (2d Cir. 1997); Hearst Corp v. Goldberger, 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

The fact that defendants are involved in a litigation pending in this District is also insufficient to sustain a finding of doing business. This argument is predicated on defendants' being named as defendants in Union Carbide Corp. v. Himont, U.S.A., Inc., 95 Civ. 0134 (SAS) (S.D.N.Y.). The docket sheet for that matter indicates that neither Royal Dutch nor Shell Transport has asserted any counterclaims in that case, and plaintiffs have submitted a January 7, 1995 Stipulation and Order in that matter in which Royal Dutch and Shell Transport specifically preserve their jurisdictional objections (Plaintiffs' Exhibit L). Thus, defendants have not voluntarily chosen to litigate in the United States, and there has been no

determination or admission in Union Carbide that defendants are subject to jurisdiction in the United States. In any event, even if defendants had consented to jurisdiction in an unrelated action or had chosen to assert a claim in such action, such conduct, without more, would not establish jurisdiction in this matter. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 50 n.5 (2d Cir. 1991); Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 956 F. Supp. 1131, 1137 (S.D.N.Y. 1997); Andros Compania Maritima S.A. v. Intertanker Ltd., 714 F. Supp. 669, 675 (S.D.N.Y. 1989).

As an alternative argument, plaintiffs claim that defendants are subject to jurisdiction in New York because they are "doing business" in New York through an agent.

> A court can assert jurisdiction over the foreign affiliate of a New York entity when the New York representative renders services on behalf of the foreign corporation that go beyond "mere solicitation" and when those services are so important to the foreign entity, that if there were no New York representative, the foreign corporations would have to perform the equivalent services. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967) (interpreting a test established in Frummer; agent made and confirmed reservations, and performed other services), cert. denied, 390 U.S. 996, 88 S.Ct. 1198, 20 L.Ed.2d 95 (1968). Among the considerations that give rise to an inference of agency have been an express agency agreement and binding actions with respect to third parties on the foreign entity by the New York based entity. Ball, 902 F.2d at 194. However, [plaintiffs] need not show that there was a formal agency agreement between the [defendants and the putative agent], N.Y. Marine Managers, Inc. v. M.V. Topor-1, 716 F. Supp. 783, 785 (S.D.N.Y. 1989) or that [defendants] exercised

> control over [the putative agent], Palmieri, 793 F. Supp. at 1194.

General Electric Co. v. Circle Air Freight Corp., supra, 1997 WL 129400 at *9.

A finding of jurisdiction based on agency has been sustained where there was an express agency agreement, where the local entity was empowered to bind the foreign defendant with respect to third parties and where there was solicitation by a non-profit New York entity for the benefit of a commonly owned foreign corporation. On the other hand, jurisdiction has been found lacking where the corporate entities were truly separate, where the foreign defendant relinquished title and risk of loss outside the state and where the promotion of defendants' products within the state constituted mere solicitation. Ball v. Metallurgie Hoboken-Overpelt, S.A., supra, 902 F.2d at 199 (collecting cases).

Plaintiffs here rely on the actions of two putative agents -- SPI and Grapsi. The alleged agency of SPI can be easily dispatched. As noted above, SPI is a Delaware holding company. Despite their voluminous submissions, plaintiffs have made no showing that SPI does business in New York or has any cognizable New York contacts whatsoever. Accordingly, even if I assume that it is appropriate to attribute SPI's conduct to defendants, there has been no averment of facts that show SPI is doing business in New York.

Grapsi presents a more difficult problem. Although Grapsi is formally an employee of Shell Oil, all expenses connected with his employment, including his salary, office rent and utilities, are reimbursed to Shell Oil by defendants. Although he neither sells nor even solicits orders for anything in New York, his services provide some benefit to defendants. Presumably, defendants would not be paying approximately $45,000 per month (more than $ 1/2 million per year) for Grapsi's services unless his services were of some value to defendants.

Neither the parties' research nor my own has disclosed any precedent involving identical facts.

Although it is a close case, I believe that an adequate showing has been made that Grapsi's acts are attributable to defendants. Grapsi is not an independent party, performing services for multiple entities as in Miller v. Surf Properties, Inc., 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958). Rather, Grapsi is the employee of a corporation that is indirectly owned by defendants. His sole function is to provide investor relations services for defendants. All of his services are, in fact, performed for defendants, and defendants pay for all expenses relating to those services. In light of these facts, and bearing in mind that, at this stage of the proceedings, all doubts must be resolved in favor of plaintiffs, I believe Grapsi's role is analogous to the affiliated reservation service which was held to be an agent in Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967), and that Grapsi's actions can, therefore, be attributed to defendants on a theory of agency.

Grapsi's status as an agent does not, however, end the analysis. Unless Grapsi's activities rise to the level of "doing business," there can be no jurisdiction over defendants under N.Y. C.P.L.R. § 301.

Grapsi's activities were limited to investor relations. That is, he provided information to shareholders, potential shareholders and other persons or entities who were interested in the business of defendants' subsidiaries. He also made arrangements for sporadic trips by officers and employees of defendants to meet with investors and potential investors. The actual investor relations program was developed overseas by defendants themselves; Grapsi's duties were limited to carrying out the program (Munsiff Dep. at 48-49; van der Vlist Dep. at 15-16; Plaintiffs' Memo. at 7). There is no allegation that Grapsi performed any services concerning defendants' investment in or acquisition of other corporations. There is no

allegation that Grapsi ever sold or offered to sell the stock of the defendants. There is no allegation that either defendant had an offering of stock in the United States at any relevant time. Thus, if Grapsi's activities had any effect on the price of defendants' stock, it was an effect in the aftermarket that had no direct effect on the capitalization or income of defendants.

Grapsi's activities do not rise to the level of doing business. Although not identical, Grapsi's activities are similar to advertizing or marketing activities which has repeatedly been held insufficient to constitute "doing business." Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 662 (S.D.N.Y. 1997) ("advertizing or marketing activities do not constitute an adequate basis for general jurisdiction absent a systematic and continuous course of doing business in the forum state.") See also Lane v. Vacation Charters, Ltd., 750 F. Supp. 120, 124 (S.D.N.Y. 1990); Schenck v. Walt Disney Co., 742 F. Supp. 838, 841 & n.2 (S.D.N.Y. 1990); Delagi v. Volkswagenwerk AG, 29 N.Y.2d 426, 432-33, 278 N.E.2d 895, 897-98, 328 N.Y.S.2d 653, 657-58 (1972).

Moreover, a contrary result would be logically inconsistent with the numerous authorities that hold that the actual sale of securities or other commercial paper in New York does not constitute doing business. E.g., Industrial Acoustics Co. v. Energy Serv., Inc., supra, 1994 WL 132114 at *2 (stock traded on New York Stock Exchange; New York transfer agent and bank account); Celi v. Canadian Occidental Petroleum Ltd., supra, 804 F. Supp. at 468 (stock traded on New York exchange); Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 565-66 (S.D.N.Y. 1985) (sale of more than $100 million in commercial paper through New York brokerage houses). The activity of investor relations is less significant to both the issuer and the shareholders than the actual sale of securities. Investor relations activities have no direct effect on the finances of either the issuer or the shareholder since it is solely an exchange of information. The actual sale of a security by an issuer, on the other hand, increases the issuer's capital

and provides the purchaser with an equity interest in the issuer; the legal relationship of the parties is altered by the exchange. Since the existing authorities hold that the actual sale of securities does not constitute doing business, it logically follows that shareholder relations activities must also be insufficient to constitute doing business.

Accordingly, I find that plaintiffs have not made an adequate showing to justify the assertion of jurisdiction over defendants pursuant to N.Y. C.P.L.R. and that jurisdiction under Rule 4(k)(1)(A) cannot be sustained.

b. Rule 4(k)(2):
Federal Long-Arm Jurisdiction

As explained by Judge Edelstein in United States v. International Bhd. of Teamsters, 945 F. Supp. 609, 616-17 (S.D.N.Y. 1996), Rule 4(k)(2) was enacted to fill the jurisdictional gap that occurred when a defendant had sufficient contacts with the United States to justify the assertion of jurisdiction but lacked sufficient contacts with any single state to permit the assertion of jurisdiction under state long-arm or other statutes:

> According to its legislative history, Rule 4(k)(2) was intended to be a narrow extension of federal jurisdiction to fill a "gap" in the enforcement of federal law:
>
> > Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation . . . . In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts,

> which was incorporated into the federal practice by the former rule.

Fed.R.Civ.P. 4(k)(2), advisory committee's notes (1993). Congress adopted the 1993 Amendment to Rule 4 following the suggestion of the Supreme Court in Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987), that

> [a] narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of . . . federal statutes.

Id. at 111, 108 S.Ct. at 413; see 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1069 (Supp. 1995) .

Jurisdiction under Rule 4(k)(2) requires three elements:

> (1) that plaintiff's cause of action arise under federal law; (2) that the defendant is not subject to the jurisdiction of the courts of any one State; and (3) that the defendant's total contacts with the United States as a whole are sufficient to confer the Court with personal jurisdiction over the defendant without offending due process.

Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., supra, 956 F. Supp. at 434.

As noted above, plaintiffs invoke the jurisdiction of this Court pursuant to RICO, 18 U.S.C. § 1964(c), and the Alien Tort Claims Act, 28 U.S.C. § 1350. Thus, the first requirement of Rule 4(k)(2) is met.

Plaintiffs provide little assistance concerning the second element. Plaintiffs' sole argument concerning the second element under Rule 4(k)(2) is the following ipse dixit in their Memorandum of Law: "If there is no jurisdiction over defendants in New York, then they are not subject to the

jurisdiction of the courts in any state" (Plaintiffs' Memo. at 46 n.32). Plaintiffs provide no factual or legal authority for this assertion. Nevertheless, because the exact nature of plaintiffs' burden concerning this element is unclear, see Siegel, The New Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction, supra, 152 F.R.D. at 252-53, and in light of my conclusion concerning the third element, I will assume that plaintiffs have satisfied this element.

The third element of Rule 4(k)(2) requires that defendants have sufficient contacts with the United States overall such that the assertion of personal jurisdiction would not offend due process.

As explained by the Court of Appeals:

> The due process test for personal jurisdiction has two related components: the "minimum contacts" inquiry and the "reasonableness" inquiry. The court must first determine whether the defendant has sufficient contacts with the forum state to justify the court's exercise of personal jurisdiction. See International Shoe, 326 U.S. at 316, 66 S.Ct. at 158. For purposes of this initial inquiry, a distinction is made between "specific" jurisdiction and "general" jurisdiction. Specific jurisdiction exists when "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum"; a court's general jurisdiction, on the other hand, is based on the defendant's general business contacts with the forum state and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts. Helicopteros, 466 U.S. at 414-16 & nn. 8-9, 104 S.Ct. at 1872-73 & nn. 8-9. Because general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's "continuous and systematic general business

contacts." Helicopteros, 466 U.S. at 416, 104 S.Ct. at 1873; see, e.g., Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 481 n.3 (3d Cir. 1993); Shute v. Carnival Cruise Lines, 897 F.2d 377, 380-81 (9th Cir. 1990), rev'd on other grounds, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991; Donatelli v. National Hockey League, 893 F.2d 459, 462-63 (1st Cir. 1990); Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987).

The second stage of the due process inquiry asks whether the assertion of personal jurisdiction comports with "traditional notions of fair play and substantial justice" -- that is, whether it is reasonable under the circumstances of the particular case. See International Shoe, 326 U.S. at 316, 66 S.Ct. at 158. The Supreme Court has held that the court must evaluate the following factors as part of this "reasonableness" analysis: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. Asahi, 480 U.S. at 113-14, 107 S.Ct. at 1032-33; see also Burger King, 471 U.S. at 476-77, 105 S.Ct. at 2184-85; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980); A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 83 (2d Cir. 1993) (discussing factors). While the exercise of jurisdiction is favored where the plaintiff has made a threshold showing of minimum contacts at the first stage of the inquiry, it may be defeated where the defendant presents "a compelling case that the presence of some other considerations would render jurisdiction

unreasonable." Burger King, 471 U.S. at 477, 105 S.Ct. at 2185.

Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567-68 (2d Cir.), cert. denied, 117 S.Ct. 508 (1996). See also Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., supra, 956 F. Supp. at 438-39. A stronger showing of minimum contacts will require a lesser demonstration of reasonableness. Burger King v. Rudzewicz, 471 U.S. 462, 477 (1985).

i. Minimum Contacts

It is instructive to commence an analysis of minimum contacts with a brief review of other cases in which minimum contacts have been found. See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., supra, 84 F.3d 560. Since plaintiffs here are asserting claims that are unrelated to any conduct by the defendants in the United States[7] they must meet the more stringent standard of minimum contacts necessary to sustain an assertion of general jurisdiction. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984).

In Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., supra, 84 F.3d 560, defendant's contacts consisted of (1) $4 million in sales into the state over a four-year period, (2) defendant's filing of state income and sales tax returns over a four-year period, (3) relationships with five independent in-state dealers, (4) contracts with four in-state building companies that were "authorized builders" for a particular product line, (5) delivering product support into the state through engineering and product data manuals, a toll-free customer service telephone number, training video tapes, computer software, marketing materials and permitting the use of its trademarks, (6) national print advertising and direct mail

[7] Indeed, plaintiffs' claims here are actually unrelated to any conduct of the defendants themselves. The precise wrongdoing at issue here was allegedly committed by defendants' indirectly owned Nigerian subsidiary -- Shell Petroleum Development Company of Nigeria, Ltd.

campaigns into the state, (7) more than 150 visits by employees and engineers over a four-year period and (8) maintenance of a resident employee for a two-year period. 84 F.3d at 570. After noting that it was a "close case," 84 F.3d at 572, the Court held that there was a sufficient showing to meet the "minimum contacts" requirement of the due process test. The Court went on, however, to find that the assertion of jurisdiction would be unreasonable and, therefore, affirmed the dismissal of the complaint.

In Helicopteros Nacionales de Columbia, S.A. v. Hall, supra, 466 U.S. 408, the Supreme Court held that there were insufficient minimum contacts to sustain general jurisdiction where defendant, a provider of transportation services, had purchased 80% of its fleet of helicopters and $4 million in spare parts and accessories in the state, sent pilots into the state for training and taking delivery of aircraft and sent management and maintenance personnel into the state for training.

And in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), the Supreme Court found sufficient contacts to sustain general jurisdiction where the general manager/president of the Philippine company moved his office into the state of Ohio to avoid the Japanese occupation of the Philippines, maintained records there, held director's meetings there and "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." 342 U.S. at 448. See also Glater v. Eli Lilly & Co., 744 F.2d 213, 215-17 (1st Cir. 1984) (insufficient contacts where defendant advertized in trade journals distributed within the state and employed eight sales representatives within the state); Congoleum Corp. v. DLW Aktiengesellschaft 729 F.2d 1240, 1242 (9th Cir. 1984) ("[N]o court has ever held that the maintenance of even a substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action.")

Judged by the foregoing standards, defendants do not have sufficient minimum contacts with the United States overall to permit the assertion of general jurisdiction. Since defendants are both holding companies, they have no sales into the United States (or anywhere else). Apart from the sporadic visits of their officers and employees to the United States to participate in investor relations meetings and the trading of their stock on the New York Stock Exchange, defendants have no direct contacts with the United States whatsoever. Since these contacts are both far fewer and less significant than those in Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., supra, 84 F.3d 560, and since Metropolitan Life was a "close case", 4 F.3d at 572, defendants' direct contacts must be insufficient here.

Attributing the actions of Grapsi to defendants does not change the result. As set forth above, Grapsi executed the investor relations program devised by defendants overseas. His activities did not generate either income or capital for defendants. Thus, his activities had less impact on defendants than that of a salesperson. Since the presence of even a substantial sales force within a state is insufficient to constitute the minimum contacts necessary to sustain general jurisdiction, it logically follows that the presence of a single investor relations agent must also be insufficient.

Finally, there is no basis for attributing the activities of SPI to defendants in assessing minimum contacts. Plaintiffs have expressly eschewed reliance on a "mere department" theory, and, thus, SPI's conduct could be attributed to defendants only on an agency theory. However, because defendants are holding companies with no operations of their own, the attribution of SPI's conduct to them would be improper.

> Where a holding company is nothing more than an investment mechanism, a device for diversifying risk through corporate acquisitions the subsidiaries conduct business not as its agents but as its investments. The

business of the parent is the business of investment, and that business is carried out entirely at the parent level.

Bellomo v. Pennsylvania Life Co., 488 F. Supp. 744, 746 (S.D.N.Y. 1980).

ii. Reasonableness

Even if I were to find that defendants had sufficient minimum contacts with the United States, application of the five-factor reasonableness test demonstrates that an assertion of general jurisdiction would be unreasonable here.

Burden on Defendants of Litigating in United States. The events that give rise to plaintiffs' claims occurred entirely overseas. It currently appears that all documentary evidence is located in either Europe or Africa and that all witnesses, with the exception of Blessing Kpuinen and Owens Wiwa, reside overseas. The burden resulting from the absence of evidence in the United States is, however, diminished by modern communications and transportation technology. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., supra, 84 F.3d at 573-74. Thus, this factor weighs slightly against the exercise of jurisdiction.

Interests of the Forum. The Amended Complaint does not allege that any of the plaintiffs, defendants or defendants' conspirators are United States citizens, nor does it allege that any relevant acts took place in the United States or involve United States citizens. In addition, plaintiffs do not identify any interest of the United States that is implicated here.[8]

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[8] Although plaintiffs do not raise the argument in opposition to defendants' motion to dismiss for lack of personal jurisdiction, it is at least arguable that the Alien Tort Claims Act, 28 U.S.C. § 1350, evidences some interest on the part of the United States in having claims of the type alleged here adjudicated in the United States. I believe that a more appropriate interpretation of Section 1350 is that it demonstrates the United States' assent to the proposition generally held by nations that certain types of conduct, such as torture, violate fundamental human rights and are never

Accordingly, this factor also weighs against the exercise of jurisdiction. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., supra, 84 F.3d at 574.

Plaintiffs' Interest in Obtaining Convenient and Effective Relief. Since virtually all the sources of proof are located overseas, the United States is no more a convenient forum for plaintiffs than it is for defendants.[9]

Efficient Administration of Justice. "In evaluating this factor, courts generally consider where witnesses and evidence are likely to be located." Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., supra, 84 F.3d at 574-75; accord Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., supra, 956 F. Supp. at 442. As noted above, with the exception of two of the plaintiffs, it appears that all sources of proof are located in either Europe or Africa.

Policy Arguments. Plaintiff has identified no policy arguments that would support the assertion of jurisdiction here, and it appears that there is at least one policy that weighs against the exercise of jurisdiction. If jurisdiction were sustained here, two foreign corporations would be haled before a United States court for conduct that allegedly occurred in either Europe or Nigeria. None of the parties allegedly involved were United States citizens, nor did any of the conduct alleged have any direct connection with the United States.

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justified. See generally Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). Since Section 1350 evidences the United States' agreement with certain universal -- and not local -- principles of conduct, I conclude that it is not sufficient to render the exercise of jurisdiction "reasonable" in this case, especially where there are adequate alternative forums that are more closely linked to either the parties or the dispute. See Section III(B), infra.

[9] The fact that United States law may be more favorable to plaintiffs than the law of another jurisdiction is not a factor to be considered in determining the reasonableness of an assertion of jurisdiction. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984); Metropolitan Ins. Co. v. Robertson-Ceco Corp., supra, 84 F.3d at 574.

Under these circumstances, a Court must be especially chary of using Rule 4(k)(2) to assert its jurisdiction over non-resident aliens. As stated in the 1993 Advisory Committee Note to Rule 4:

> The district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selections so onerous that injustice could result. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." Asahi Metal Indus. v. Superior Court of Cal., Solano County, 480 U.S. 102, 115 (1987), quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan J., dissenting).

Accord Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., supra, 956 F. Supp. at 442.

Thus, there is also an insufficient basis to sustain jurisdiction under Rule 4(k)(2).

3. Conclusion

The foregoing facts demonstrate that defendants have no contacts with either New York State or the United States sufficient to sustain the exercise of personal jurisdiction in this case. Accordingly, defendants' motion to dismiss for lack of personal jurisdiction should be granted.

B. Forum Non Conveniens[10]

The Court of Appeals for the Second Circuit has very recently summarized both the mode of analysis and the factors to be considered in evaluating a motion to dismiss on the ground of forum non conveniens:

> The doctrine of forum non conveniens permits a court to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim. Gulf Oil v. Gilbert, 330 U.S. 501, 507 (1947). Through a discretionary inquiry, the court determines where litigation will be most convenient and will serve the ends of justice. R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991). The inquiry focuses on three principal factors: the availability of an alternative forum, the private interests of the parties, and the public interest in forum selection. Id.
>
> The forum non conveniens inquiry has two steps. First, in order to grant a motion to dismiss for forum non conveniens, a court must satisfy itself that the litigation may be conducted elsewhere against all defendants. Blanco v. Banco Industrial De Venezuela, S.A., 997 F.2d 974, 981 (2d Cir. 1993). A forum is not inadequate even if the foreign justice system differs from that of the United States. Id. at 982. At this stage, considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards, Flynn v. General Motors, Inc., 141 F.R.D. 5, 9 (E.D.N.Y. 1992), so such a finding is rare.

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[10] Since I conclude that the action should be dismissed for lack of personal jurisdiction, the forum non conveniens aspect of defendants' motion need not be reached. 15 C.Wright, A. Miller & E.Cooper, Federal Practice & Procedure § 3828 at 287 (2d ed. 1986) ("The doctrine of forum non conveniens does not come into play unless the court . . . has both subject matter and personal jurisdiction . . . ."). Nevertheless, I address the issue to minimize the likelihood of a remand in the event the District Court reaches a different conclusion concerning personal jurisdiction.

Blanco, 997 F.2d at 982 ("[I]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.") (quoting Chesley v. Union Carbide Corp., 927 F.2d 60, 66 (2d Cir. 1991)). If there is no adequate alternative forum, the inquiry ends, and the motion to dismiss is denied. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

If the existence of an adequate alternative forum is established, the court entertaining the motion must carefully consider all the private and public interest factors enumerated by the Supreme Court in Gulf Oil, 330 U.S. at 508-09. The private factors include the access to sources of proof, cost of obtaining willing witnesses, availability of compulsory process for unwilling witnesses, and other practical concerns. Id. at 508; R. Maganlal, 942 F.2d at 168. The public factors are court congestion, interest of forums in deciding local disputes, and interest in issues of foreign law being decided by foreign tribunals. Gulf Oil, 330 U.S. at 508-09; R. Maganlal, 942 F.2d at 168.

The defendant bears the burden to establish clearly each factor, Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43-44 (3d Cir. 1988), and to demonstrate that the balance tilts strongly in favor of the purported alternative forum. R. Maganlal, 942 F.2d at 167. In general, a plaintiff's choice of forum is to be respected, but a non-U.S. plaintiff's choice warrants less deference. Murray v. British Broad. Corp., 81 F.3d 287, 290 (2d Cir. 1996); David Tunick, Inc. v. Kornfeld, 813 F. Supp. 988, 992 (S.D.N.Y. 1993).

PT United Can Co. v. Crown Cork & Seal Co., Docket No. 97-7252, slip op. at 1630-32 (2d Cir. Feb. 25, 1998). See also Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46-47 (2d Cir. 1996); Scottish Air Int'l Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1232 (2d Cir. 1996).

1. Adequate Alternative Forum

Defendants contend the courts of both England and the Netherlands are adequate alternative forums in which this action could be tried. Defendants have agreed that, if dismissal on forum non conveniens is granted, they will consent to service of process, comply with all applicable discovery rules, consent to pay any judgment rendered, waive any security bond that might be required and waive any statute of limitations defense if the action in the alternative forum is commenced within one year of the final disposition of this matter (Defendants' Reply Memorandum in Support of their Motion to Dismiss, dated Sept. 29, 1997 at 18 n.24).

Due to the historical tie between the United States and England, the English judicial system bears a unique relationship to our judicial system. United States Courts regularly cite English authorities to explain the origin of countless legal principles.[11] As a result of this unique relationship, "United States courts consistently have found

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[11] E.g., Gasperini v. Center for Humanities, Inc., 116 S.Ct. 2211, 2231-32 (1996); Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (concurring opinion); Hess v. Port-Authority Trans-Hudson Corp., 513 U.S. 30, 54 (1994) (dissenting opinion); Staples v. United States, 511 U.S. 600, 618 (1994); Heller v. Doe, 509 U.S. 312, 326 (1993); Delaware v. New York, 507 U.S. 490, 498 n.9 (1992); White v. Illinois, 502 U.S. 346, 361 (1992); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268-69 (1989); Bowen v. Massachusetts, 487 U.S. 879, 925 (1988) (dissenting opinion); McCleskey v. Kemp, 481 U.S. 279, 339 n.10 (1987) (dissenting opinion); United States v. Wydermyer, 51 F.3d 319, 324 (2d Cir. 1995); Robins Island Preservation Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 420 (2d Cir. 1992); Strachan v. Colon, 941 F.2d 128, 129 (2d Cir. 1991); Doe v. United States, 742 F.2d 61, 63 (2d Cir. 1984); United States v. Roy, 734 F.2d 108, 113 n.2 (2d Cir. 1984) (concurring opinion); Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, 707 F.2d 680, 682 (2d Cir. 1983). Indeed, the Second Circuit has even looked to English authorities to interpret the scope of the jurisdictional statute plaintiffs invoke here, the Alien Tort Claims Act. Filartiga v. Pena-Irala, supra, 630 F.2d at 885, 886 n.19.

[English courts] to be neutral and just forums." Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993); accord In re Lloyd's American Trust Fund Litig., 954 F. Supp. 656, 673 (S.D.N.Y. 1997). Thus, when a forum non conveniens dismissal has been sought in favor of a trial in England, United States courts have routinely found the English courts to be adequate alternatives. See Panama v. BCCI Holdings S.A., 119 F.3d 935, 951-52 (11th Cir. 1997); Robinson v. TCI/US West Communications, Inc., 117 F.3d 900, 908 (5th Cir. 1997); Murray v. British Broad. Corp., supra, 81 F.3d at 292-93; Nolan v. Boeing Co., 919 F.2d 1058, 1068 (5th Cir. 1990); Coakes v. Arabian Am. Oil Co., 831 F.2d 572, 575 (5th Cir. 1987); Syndicate 420 at Lloyd's London v. Early Am. Ins. Co., 796 F.2d 821, 828-30 (5th Cir. 1986); Watson v. Merrell Dow Pharm., Inc., 769 F.2d 354, 356 (6th Cir. 1985); Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 894-95 (5th Cir. 1984); Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 615-16 (6th Cir. 1984); Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv, 711 F.2d 1231, 1238-39 (5th Cir. 1983); United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd., 976 F. Supp. 207, 212 (S.D.N.Y. 1997); Breindel & Ferstendig v. Willis Faber & Dumas, Ltd., 95 Civ. 7905 (SHS), 1996 WL 413727 at *3 (S.D.N.Y. July 24, 1996); Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 940 F. Supp. 528, 536-37 (S.D.N.Y. 1996); Rein v. Rein, 95 Civ. 4030 (SHS), 1996 WL 273993 (S.D.N.Y. May 23, 1996), aff'd, 111 F.3d 124 (2d Cir. 1997); Calgarth Inv., Ltd. v. Bank Saderat Iran, 95 Civ. 5332 (MBM), 1996 WL 204470 at *5 (S.D.N.Y. Apr. 26, 1996), aff'd, 108 F.3d 329 (2d Cir. 1997); Kilvert v. Tambrands, Inc., 906 F. Supp. 790, 797-98 (S.D.N.Y. 1995); Penny v. United Fruit Co., 869 F. Supp. 122, 130 (S.D.N.Y. 1994); Georgiadis v. First Boston Corp., 90 Civ 7672 (PKL), 1994 WL 392229 at *3 (S.D.N.Y. July 27, 1994); Lindner Fund, Inc. v. Polly Peck Int'l PLC, 811 F. Supp. 133, 135 (S.D.N.Y. 1992). Indeed, with only one

exception,[12] neither plaintiffs' research nor my own has found any case in which an English court was not found to be an adequate alternative forum.

Both plaintiffs and defendants have submitted the expert declarations of English barristers on the issue of whether English courts would entertain plaintiffs' claims. The declarations are largely consistent.[13] Based upon those declarations, it appears that plaintiffs' claims are cognizable in England as common law torts,[14] although each are subject to defenses -- dual actionability, transmissibility and the act of state doctrine -- that might bar any recovery. However, plaintiffs' expert does not opine that recovery is impossible in an English court, nor does defendants' expert opine that recovery in an English court would be certain if plaintiffs can prove the facts they allege.

Thus, plaintiffs' principal objection to the adequacy of an English court is that England's substantive law appears to be less favorable to plaintiffs than the law of the United States.[15]

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[12] Plaintiff has cited Laker Airways Ltd. v. Pan American World Airways, 568 F. Supp. 811 (D.D.C. 1983) which found England to be an inadequate forum for an anti-trust claim because it has no equivalent to the Sherman Anti-Trust Act.

[13] Plaintiffs' expert, Peter Duffy, Q.C., was formerly the student of defendants' expert, Lawrence Collins, Q.C. (Collins Dep. at 16). Each acknowledges the expertise of the other (Id.; Duffy Dec. at ¶ 7).

[14] Plaintiffs' RICO claim is not cognizable in England. The absence of a RICO claim does not, however, render a foreign forum inadequate. PT United Can Co. v. Crown Cork & Seal Co., supra, slip op. at 1633.

[15] Plaintiffs' argument assumes that internal United States law applies to all of their claims. Plaintiffs offer no choice of law analysis to explain this conclusion, and it is not at all clear that this conclusion is correct. Indeed, if internal United States law applied to the claims here, it is doubtful that there would be jurisdiction under the Alien Tort Claims Act because that statute requires a violation of the law of nations. See Filartiga v. Pena-Irala, supra, 630 F.2d at 881.

However, as the Supreme Court noted in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1982):

> The [court below] erred in holding that plaintiffs may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry.

See also Misubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985); Roby v. Corporation of Lloyd's, supra, 996 F.2d at 1363; United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd., supra, 976 F. Supp. at 212; MGN Pension Trustees v. Morgan Stanley Trust Co., 947 F. Supp. 611, 617-18 (E.D.N.Y. 1996); Doe v. Hyland Therapeutics Div., 807 F. Supp. 1117, 1124 (S.D.N.Y. 1992); Flynn v. General Motors, Inc., 141 F.R.D. 5, 9 (E.D.N.Y. 1992); Damigos v. Flanders Compania Navira, S.A., 716 F. Supp. 104, 108-09 (S.D.N.Y. 1989); Travelers Indem. Co. v. S/S Alca, 710 F. Supp. 497, 499-500 (S.D.N.Y. 1989); DeYoung v. Beddome, 707 F. Supp. 132, 137 (S.D.N.Y. 1989); Fustok v. Banque Populaire Suisse, 546 F. Supp. 506, 513-14 (S.D.N.Y. 1982).

In Monsanto Int'l Sales Co. v. Hanjin Container Lines, Ltd., 770 F. Supp. 832, 838 (S.D.N.Y.), modified, 1991 WL 210951 (S.D.N.Y. Oct. 8, 1991), aff'd, 962 F.2d 4 (2d Cir. 1992), Judge Wood rejected a similar challenge to a proposed alternative forum explaining:

> Although plaintiffs contend that Taiwan is an inadequate forum, their complaints relate to what they see as the likely outcome of the litigation in Taiwan, not to any defect in the forum. . . . [T]he test of whether an alternative forum for the litigation exists does not hinge upon plaintiff's

prediction of the outcome of the case in the alternative forum under consideration.

In view of the various procedural issues defendants have agreed to waive if forum non conveniens dismissal is granted, the only other objections cited by plaintiffs is the unavailability of contingent fee arrangements in England and the likelihood that plaintiffs will be dependent on pro bono counsel for representation. The former objection does not render England an inadequate alternative forum. Murray v. British Broad. Corp., 81 F.3d 287, 292-93 (2d Cir. 1996). As to the latter, the absence of a right to appointed counsel in England is identical to the practice in the courts of the United States.[16]

Accordingly, England is an adequate alternative forum. Since I need not reach the issue, I express no opinion concerning the adequacy of the courts of the Netherlands.

2. Private Interest Factors

Access to Sources of Proof. As between the United States and England, there is greater access to proof in England. Shell Transport is headquartered in England. To the extent its documents are relevant, access to these documents will be easier and less expensive in England. Similar arguments apply to the documents of Royal Dutch which is headquartered in the Netherlands and is more proximate to England than the United States. Although, modern technology for the copying of documents has diminished the significance of this factor, it still weighs in favor of England.

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[16] Although none of the parties address the issue, there is some authority that there is a common law right in Great Britain to appointed counsel in civil cases. R.W. Sweet, Civil "Gideon" and Justice in the Trial Court (the Rabbi's Beard), 52 The Record of the Association of the Bar of the City of New York 915, 926 (Dec. 1997); E. Johnson Jr., Toward Equal Justice: Where the United States Stands Two Decades Later, 5 Md. J. Contemp. Legal Issues 199, 204 (1994).

Defendants have also identified a number of witnesses in England, the Netherlands and Nigeria with knowledge of the events alleged in the Amended Complaint (Plaintiffs' Exhibit C-1 at 3-6; van der Vlist Dep. at 121-59; Munsiff Dep. at 70-97). The convenience of the witnesses who reside in Europe would be furthered by a trial in England, and to the extent witnesses from Nigeria are necessary, I take judicial notice of the fact that Lagos is approximately 3,420 miles from London and 4,893 miles from New York. In addition, while there are direct flights from Lagos to London, there are no direct flights from Lagos to New York (Declaration of Susan Birthwright dated Sep. 24, 1997). Thus, witnesses from Nigeria are also more accessible in London than in New York.

In contrast, although two of the plaintiffs reside in the United States, it appears that they do not reside in the Southern District of New York (Declaration of Jennifer M. Green, dated Aug. 29, 1997 ("Green Dec.") at ¶¶ 3-4). Based on the fact that a substantial number of former Nigerian nationals have sought asylum in the United States (Green Dec. at ¶ 19), plaintiffs also assert that there are a number of witnesses in the United States. However, since there has been no showing that any of these refugees have any knowledge concerning the specific acts alleged in the Amended Complaint, their status as witnesses is speculative.

Accordingly, it appears that both documentary and testimonial evidence would be more accessible to a court in England.

Cost of Obtaining Willing Witnesses. The majority of the witnesses identified to date are located in either England, the Netherlands or Nigeria. Both the Netherlands and Nigeria are significantly closer to England than New York, and, as noted above, there is no direct air service between New York and Nigeria. Accordingly, it will cost less to obtain willing witnesses for a trial in England than a trial in the Southern District of New York.

Availability of Compulsory Process. Since it currently appears that all witnesses other than two of the plaintiffs are located overseas, their testimony for a trial in this district could be secured only through depositions taken by letters rogatory. In addition to the burden and delay inherent in conducting discovery through letters rogatory, the depositions that result from such discovery letters rogatory deprive the fact finder of the opportunity to view the witness and assess his/her demeanor. Scottish Air Int'l Inc. v. British Caledonian Group, PLC, supra, 81 F.3d at 1233; Polaroid Corp. v. Casselman, 213 F. Supp. 379, 382 (S.D.N.Y. 1962) ("Depositions, deadening and one-sided, are a poor substitute for live testimony especially where . . . vital issues of fact may hinge on credibility.").

In contrast, a trial in England would permit at least the witnesses who reside there to be subpoenaed for trial.

Other Practical Concerns. Since defendants have no assets in the United States, enforcement of any judgment rendered by this Court would be dependent on foreign courts and international judgment enforcement treaties. If trial were held in England, on the other hand, defendants have agreed to pay any judgment rendered by an English court.

Under this category, plaintiffs claim that they lack the funds to litigate overseas and that a trial in England would be extremely difficult if not practically impossible. Defendants do not controvert plaintiffs' claim of poverty, and I accept it as true. The financial hardship to plaintiffs that would result from a dismissal is an appropriate factor to consider in determining a motion to dismiss on the ground of forum non conveniens. Murray v. British Broad. Corp., supra, 81 F.3d at 292-93.

The problem with this argument, however, is that it does not explain why a trial in this district would be less expensive or more convenient. Regardless of where plaintiffs litigate their claims, the cost of preparing and trying this case will be substantial and will, in all probability, exceed plaintiffs' means.

Even if this Court were to retain the case, plaintiffs would still bear the burden of reviewing defendants' documents overseas and copying and shipping those documents to New York. In addition, since a defendant or witness is ordinarily deposed at his or her residence, 1 M.Silberberg, Civil Practice in the Southern District of New York § 17.11 (1995), plaintiffs would also bear the expense of conducting depositions in England, the Netherlands and Nigeria if the matter remained in this Court.

In short, although plaintiffs' poverty is a serious barrier to the litigation of their claims, plaintiffs have not demonstrated how the barrier will be lower if their claims were tried here. Thus, plaintiffs' poverty is a neutral factor.

3. Private Interest Factors

Court Congestion. Although defendants are correct in their contention that this District is one of the busiest in the country, plaintiffs are also correct that defendants have not shown that the English courts are any less congested. Accordingly, this factor is neutral.

Interest of the Forum in Deciding a Local Dispute. None of the parties to this action is a citizen of the United States. It is not alleged that any of the acts in issue occurred in the United States. It is not alleged that any of the defendants' acts were intended to have a direct effect on the United States. It is not alleged that any of the defendants' acts did, in fact, have a direct effect on the United States. Thus, this action cannot be characterized as "local" to the United States.

Although the contacts between England and the dispute are not overwhelming, there are at least four readily identifiable connections between the litigation and England. First, the conduct of an English corporation -- Shell Transport -- is directly in issue. Second, plaintiffs allege that several meeting were held in England at which defendants allegedly formulated the strategy that resulted in the human rights violations claimed here (Amended Complaint ¶¶ 40, 70). Third, at the time of the

conduct in issue, Nigeria was a member of the Commonwealth of Nations.[17] Fourth, the case raises the issue of whether the actions of Shell Transport's indirectly-owned Nigerian subsidiary can be attributed to Shell Transport. Since Shell Transport is an English corporation, questions concerning its potential liability for the conduct of its subsidiaries is a question of English law, Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, supra, 81 F.3d at 1239, in which English courts have primary interest.

Accordingly, although the bulk of the issues raised in this action cannot fairly be characterized as "local" to either the United States or England, there are at least four ties between

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[17] The Commonwealth of Nations suspended Nigeria as a result of Saro-Wiwa's execution. Commonwealth Suspends Nigeria Over Executions, N.Y. Times, Nov. 12, 1995, § 1 at 5. For the United States' reaction to Saro-Wiwa's execution, see John Goshko, U.S. Censures Nigeria's Execution of Nine Activists, Installs Penalties; Clinton Recalls Envoy, Bans Military Sales, Seeks U.N. Action, Washington Post, Nov. 11, 1995 at A26.

the action and England but no ties to either the United States[18] or this District.

4. Conclusion

Since there is an adequate alternative forum and since all the public and private interest factors are either neutral or favor England, I also recommend, in the alternative, that this action be dismissed under the doctrine of forum non conveniens.

C. Failure to State a Claim on Which Relief Can Be Granted

In light of my recommendation that the action be dismissed for either lack of personal jurisdiction or under the doctrine of forum non conveniens, I do not reach the third aspect of defendants' motion which alleges that plaintiffs have failed to state a claim on which relief can be granted. This aspect of defendants' motion raises extremely difficult and potentially far-reaching questions concerning the law of nations. Since I do not believe there is any need to address

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[18] Although the Alien Tort Claims Act demonstrates a United States interest in providing a forum remedy for the adjudication of violations of international law, see generally Filartiga v. Pena-Irala, supra, 630 F.2d at 878, that interest does not preclude dismissal based on forum non conveniens. In Filartiga, the Court expressly left this issue for the district court to consider on remand, 630 F.2d at 890, suggesting that the policy underlying the Alien Tort Claims Act is not of sufficient force to preclude categorically a forum non conveniens dismissal. Moreover, courts have regularly granted forum non conveniens dismissals in other contexts notwithstanding the applicability of a federal statute regulating the conduct of one of the parties. E.g., Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 1002 (2d Cir. 1993) ("While appellants are correct in asserting that United States courts have an interest in enforcing United States securities laws, this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens.") See also Murray v. British Broad. Corp., supra, 81 F.3d 287 (affirming forum non conveniens dismissal of claims alleging violation of Lanham Act and United States copyright law).

these serious and complex issues at this stage, I decline to do so.

IV. Conclusion

For all the foregoing reasons, I respectfully recommend that this matter be dismissed for lack of personal jurisdiction or, in the alternative, pursuant to the doctrine of forum non conveniens. If the action is dismissed on the latter ground, the dismissal should be conditioned on defendants' stipulation that they will consent to service of process in England, comply with all applicable discovery rules in England, consent to pay any judgment rendered by an English court, waive any security bond that might be required and waive any statute of limitations defense if the action in the alternative forum is commenced in an English court within one year of the final disposition of this matter.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, United States District Judge, 500 Pearl Street, Room 1610, and to the chambers of the undersigned, 40 Foley Square, Room 503, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Wood. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 986 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd.,

838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237- 238 (2d Cir. 1983).

Dated: New York, New York
March 31, 1998

Respectfully submitted,

/s/ Henry Pitman
HENRY PITMAN
United States Magistrate Judge

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APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC, FILED OCTOBER 25, 2000

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED OCT. 25 2000
ROSEANN B. MACKECHNIE

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of October two thousand.

Ken Wiwa, et. al.,

Plaintiffs-Appellants-Cross-Appellees,
Dkt No: 99-7223 (L), 99-7245(X)

v

Royal Dutch Petroleum Co., et. al.,

Defendants-Appellees-Cross-Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Royal Dutch Petroleum, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX F

TORTURE VICTIM PROTECTION ACT OF 1991, PUB. L. NO. 102-256, 106 STAT. 73

Public Law 102-256
102d Congress

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical

pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.

APPENDIX G

FIRST AMENDED COMPLAINT, DATED APRIL 29, 1997, IN NO. 96 CIV. 8386 (FILED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, individually and as Executor of the Estate of his deceased father KEN SARO–WIWA;

and

OWENS WIWA;

and

BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN;

and

JANE DOE,

Plaintiffs,

v.

ROYAL DUTCH PETROLEUM COMPANY;

and

SHELL TRANSPORT AND TRADING COMPANY, p.l.c.,

Defendants.

96 Civ. 8386
(KMW) (HBP)

FIRST AMENDED COMPLAINT FOR SUMMARY EXECUTION; CRIMES AGAINST HUMANITY; TORTURE; CRUEL, INHUMAN OR DEGRADING TREATMENT; ARBITRARY ARREST AND DETENTION; VIOLATION OF THE RIGHTS TO LIFE, LIBERTY AND SECURITY OF PERSON AND PEACEFUL ASSEMBLY AND ASSOCIATION; WRONGFUL DEATH; ASSAULT AND BATTERY; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; NEGLIGENCE; AND VIOLATIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

DEMAND FOR JURY TRIAL

Introduction

1. On November 10, 1995, internationally renowned author and human rights and environmental activist Ken Saro-Wiwa and youth leader John Kpuinen were hanged in Port Harcourt, Nigeria. Ken Saro-Wiwa was the leader of the Movement for the Survival of Ogoni People ("MOSOP") and John Kpuinen was the Deputy President of MOSOP's youth wing, the National Youth Council of Ogoni People ("NYCOP"). Saro-Wiwa and Kpuinen were among a group of activists falsely accused of murder and tried before a special tribunal in proceedings which violated international standards of due process.

2. The executions of Ken Saro-Wiwa and John Kpuinen by the Nigerian military junta and the campaign to falsely accuse them were carried out with the knowledge, consent, and/or support of Defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., ("Defendants" or "Royal Dutch/Shell") and their agents and officers, as part of a pattern of collaboration and/or conspiracy between Defendants and the military junta of Nigeria to violently and ruthlessly suppress any opposition to Royal Dutch/Shell's conduct in its exploitation of oil and natural gas resources in Ogoni and in the Niger Delta.

3. The circumstances under which Jane Doe was beaten and shot further illustrate Royal Dutch/Shell's effort to suppress any and all opposition to its activities in Ogoni. In April 1993, Jane Doe was shot for her participation in a peaceful demonstration against the efforts of Royal Dutch/Shell to bulldoze her farmland to construct a pipeline for their commercial venture.

4. Defendants Royal Dutch/Shell, together with the military regime governing Nigeria, acting through the Shell Petroleum Development Company of Nigeria Limited ("SPDC"), and acting with other agents and co-conspirators have, in the past and continuing through the present, used force

and intimidation to silence any opposition to their activities in Nigeria which include the exploitation of the petroleum resources of the Delta and spoliation of the environment there. Defendants' conduct violates state and federal law, and international law, including the prohibitions against torture, summary execution, crimes against humanity, and the Racketeer Influenced and Corrupt Organization Act (RICO).

JURISDICTION

5. This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331 (federal question jurisdiction), 18 U.S.C. § 1964 (c) (Racketeer Influenced and Corrupt Organizations Act), and 28 U.S.C.§ 1350 (Alien Tort Claims Act). The Alien Tort Claims Act provides federal jurisdiction for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

6. In addition, Plaintiffs invoke the supplemental jurisdiction of this Court, 28 U.S.C. § 1367, over claims based upon laws of the State of New York.

PARTIES

7. Plaintiff Ken Wiwa brings this action individually and as executor of the estate of his father, Ken Saro-Wiwa, now deceased, who was a subject, citizen, and resident of Nigeria. Ken Wiwa presently resides in England and is a citizen of Great Britain.

8. Plaintiff Owens Wiwa is a resident of Canada and a citizen of Nigeria. He is the brother of Ken Saro-Wiwa.

9. Plaintiff Blessing Kpuinen brings this action individually and as administratrix of the estate of her husband, John Kpuinen, now deceased, who was a subject, citizen, and resident of Nigeria. Plaintiff Kpuinen presently resides in the United States and is a citizen of Nigeria.

10. Plaintiff Jane Doe is a citizen of Nigeria. She files anonymously out of fear for her safety if her identity were known.

11. Defendant Royal Dutch Petroleum Company is a corporation organized under the laws of the Netherlands. Its corporate headquarters are in The Hague, Netherlands.

12. Defendant Shell Transport and Trading Company, p.l.c., is a corporation organized under the laws of England. Its corporate headquarters are in London, England.

13. Defendants Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c. ("Royal Dutch/Shell"), are holding companies which, together, operate and control the Royal Dutch/Shell Group.

14. Royal Dutch/Shell, through their wholly owned subsidiaries, are major investors in Nigeria and explore for, produce and sell energy products derived from Nigerian oil and natural gas.

15. Royal Dutch/Shell wholly own Shell Petroleum, Inc., a holding company, incorporated and organized under the laws of Delaware with offices in Houston, Texas, which in turn wholly owns Shell Oil Company ("Shell USA"), a corporation incorporated in Delaware with offices in Houston, Texas, and doing business in New York, New York.

16. Royal Dutch/Shell maintain offices in New York City, staffed with its employees.

17. Shell USA was formed by Royal Dutch/Shell for corporate finance purposes to conduct its business in the U.S. and, as such, Shell USA is the agent of Royal Dutch/Shell.

18. Upon information and belief, Royal Dutch/Shell controls the activities of Shell USA, including the offices maintained in New York.

19. Royal Dutch/Shell wholly owns The Shell Petroleum Company, Ltd., a holding company which in turn wholly owns Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC"), a corporation doing business in Nigeria.

20. Plaintiffs are informed and believe, and on that basis allege, that at all times herein material: (a) Defendants were the employers of and/or working in concert with the Nigerian military regime; and (b) the Nigerian military regime was acting as the agent of, and/or working in concert with Royal Dutch/Shell, and was acting within the course and scope of such agency, employment and/or concerted activity. To the extent that said conduct was perpetrated by the military regime, Defendants conspired in, confirmed, and/or ratified, the same.

21. Plaintiffs are informed and believe, and on that basis allege, that at all times herein material, Defendants Royal Dutch/Shell dominated and controlled SPDC and each was the alter ego of the other.

22. Plaintiffs are informed and believe, and on that basis allege, that at all times herein material, each Defendant conspired with his/her co-defendants and/or the military regime by entering into an agreement to commit wrongful and tortious acts contained herein and each Defendant participated in or committed a wrongful act in furtherance of said conspiracy which resulted in injury to the Plaintiffs.

23. Whenever and wherever reference is made in this Complaint to any conduct by Defendant or Defendants, such allegations and references shall also be deemed to mean the conduct of each of the Defendants, acting individually, jointly and severally.

24. Whenever and wherever reference is made to individuals who are not named as Defendants in this Complaint, but were employees/agents of Defendants, such individuals at all relevant times acted on behalf of the

Defendants named in this Complaint within the scope of their respective employments.

STATEMENT OF FACTS

General Facts

25. Ogoni is a densely populated rural area of approximately 404 square miles in southern Nigeria.

26. Royal Dutch/Shell began oil production in the Ogoni region in or about 1958.

27. Royal Dutch/Shell appropriated land used for oil exploitation through misrepresentation and coercion and without adequate compensation to the owners.

28. Upon information and belief, approximately 76 percent of the natural gas produced during the exploration and exploitation of the crude oil in Ogoni has been permitted to flare, thereby causing persistent air and noise pollution and reduced agricultural yields in the surrounding area.

29. The oil-related pollution caused by Royal Dutch/Shell's activities has contaminated the local water supply and agricultural land and killed fish; the local economies are based largely on subsistence farming and fishing.

30. Nigeria produces approximately 1.7 to 1.8 million barrels per day of oil. Approximately 90% of this yield is produced in the area of the Niger Delta, which contains the Ogoni region.

31. Approximately 40% of Nigeria's oil production is exported to the United States.

32. Royal Dutch/Shell conducts, and has conducted, its operations in Ogoni and the Niger Delta negligently and with reckless disregard for its effect on the population, wildlife and land of Ogoni. For example:

a. The manner of Royal Dutch/Shell's operation leads and has led repeatedly to oil spillage and gas flares.

b. In June of 1993, Royal Dutch/Shell permitted oil from its Bomu-Tai pipeline to spill into the neighboring villages and countryside for 40 days.

c. Royal Dutch/Shell dug and used unlined waste pits in the middle of Ogoni villages.

33. At all times relevant hereto, the Nigerian military regime was acting in conspiracy with, at the request of and/or on behalf of Defendants. In the alternative, the regime was acting at all times relevant hereto as an agent for Defendants. Upon information and belief, the acts of conspiracy include, but are not limited to, the following:

a. Royal Dutch/Shell's payments, directly or indirectly, to the military, police (including supernumerary police), intelligence, and/or other personnel assigned to Royal Dutch/Shell installations in Nigeria;

b. Royal Dutch/Shell's contracting for the purchase of weapons, directly or indirectly, from or for the Nigerian police (including supernumerary police), military, intelligence, and/or other security agencies or forces or individuals;

c. The surveillance, monitoring and exchange of intelligence between Royal Dutch/Shell and the Nigerian military, police (including supernumerary police), intelligence, and/or other security agencies or forces or individuals;

d. Royal Dutch/Shell's logistical support, directly or indirectly, to the Nigerian police (including supernumerary police), military, intelligence, and/or other security agencies or forces by the provision of transportation vehicles, patrol boats, ammunition and other materiel;

e. Royal Dutch/Shell's participation in the planning and coordination of "security operations" including raids and terror campaigns conducted in Ogoni and the Niger Delta, through regular meetings between Royal Dutch/Shell, their agents, alter-egos, co-conspirators, and officials of the local security forces;

f. The hiring by Royal Dutch/Shell of security personnel from the ranks of the Nigerian police to implement the operations referred to in subparagraph (e) above;

g. The campaign to arrest and execute Ken Saro-Wiwa and John Kpuinen on fabricated murder charges, including Royal Dutch/Shell's bribery or attempted bribery of two witnesses to give false testimony against Saro-Wiwa;

h. A coordinated media and public relations campaign by Royal Dutch/Shell and the Nigerian government to discredit MOSOP leaders, attributing to MOSOP and Saro-Wiwa airplane hijacking, kidnapping, and other acts of violence.

34. In late October, 1990, villagers in Umuechem, a neighboring community to Ogoni, held a demonstration against Royal Dutch/Shell's operation.

35. On or about October 29, 1990, on information and belief, SPDC, acting at all times as the agent of Royal Dutch/Shell, claimed that there would be an attack on October 30, 1990 on its camp site and requested that the Rivers State Commissioner of Police provide the Mobile Police Force for security protection.

36. SPDC specifically requested the assistance of the Mobile Police Force, although this force, popularly known in Nigeria as "kill and go," was widely reputed to commit massacres and other grave human rights violations.

37. On or about October 31, 1990 and November 1, 1990, the mobile police carried out massive scorched earth operations resulting in a massacre of 80 villagers. Over 495 houses were damaged or destroyed.

38. Upon information and belief, following the attack at Umuechem, Royal Dutch/Shell's general manager in Nigeria requested the continued police involvement for their ongoing operation.

39. By 1993, at least 300,000 Ogonis, more than half the population of Ogoni, supported the Movement for Survival of Ogoni People (MOSOP), a human rights organization aimed at protecting the rights of the Ogoni people, including protesting the effects of the oil exploitation on the Ogoni.

40. Upon information and belief, on or about February 15, 1993 through February 18, 1993, meetings of Royal Dutch/Shell and Nigerian officials were held in the Netherlands and England to formulate anti-MOSOP campaigns.

41. Upon information and belief, on or about April 28, 1993, SPDC, acting on behalf of Royal Dutch/Shell, together with Willbros West Africa, Inc. ("Willbros"), a pipeline contractor, and in the company of security troops, entered the Ogoni village of Biara to bulldoze farmland in preparation for the Rumuekpe-Bomu pipeline.

42. In reaction to the actions of SPDC and Willbros, villagers gathered to protest the bulldozing. Upon information and belief, SPDC personnel called in government troops who fired on villagers peacefully protesting the destruction of their farms. SPDC employees were present during these operations.

43. On or about April 30, 1993, Plaintiff Jane Doe was beaten and shot by the government troops while protesting the destruction of her property.

44. In early May, 1993, the Nigerian military took further actions against villagers at the behest of Defendants.

45. On May 4, 1993, in a letter to the Governor of Rivers State, the general manager of SPDC's eastern division requested that the Nigerian government provide "assistance as usual" so that work on the pipeline could continue.

46. Ken Saro-Wiwa was an outspoken critic of Royal Dutch/Shell's operation in the Ogoni region, charging that Royal Dutch/Shell was "waging an ecological war against the Ogoni."

47. In April and June, 1993, Ken Saro-Wiwa and other MOSOP activists were arrested and detained.

48. On or about June 21, 1993, during Saro-Wiwa's detention, Royal Dutch/Shell issued a press statement accusing Saro-Wiwa of organizing a secessionist movement and attacked his environmental protests as being a pretext used to build his political movement.

49. On or about July 6, 1993, while still in detention, Ken Saro-Wiwa was elected president of MOSOP.

50. John Kpuinen held various positions, including that of Deputy President of the National Youth Council of Ogoni People (NYCOP), MOSOP's youth wing. In that capacity, Kpuinen was active in NYCOP's environmental campaign against Royal Dutch/Shell and the Nigerian military regime.

51. Saro-Wiwa and Kpuinen supported and organized peaceful demonstrations in Ogoni.

52. On or about August 5, 1993, the Nigerian military led an attack which resulted in the deaths of at least thirty-five residents of the Ogoni village of Kaa.

53. Upon information and belief, from on or about September 1 through 15, 1993, Nigerian military troops, using Royal Dutch/Shell boats, attacked Ogoni villages on the Andoni border.

54. Upon information and belief, on the days of the attacks, a helicopter chartered by Royal Dutch/Shell reconnoitered the villages of Eeken, Gwara and Kenwibgara along the Andoni border. The military operations resulted in the massacre of over 1000 Ogonis and massive property devastation which left approximately 20,000 people homeless.

55. In September 1993, Ogoni villagers complained about the ongoing environmental contamination due to leaking from the Royal Dutch/Shell pipeline to Royal Dutch/Shell officials in Port Harcourt and local officials in Bomu-Tai.

56. Upon information and belief, on or about October 24, 1993, Royal Dutch/Shell, acting through SPDC, called the military police into the area near the Korokoro flow line; the military police arrived in vehicles supplied by Royal Dutch/Shell; and Royal Dutch/Shell staff were present. The military police shot a seventy-four-year-old man and two youths, killing one.

57. Royal Dutch/Shell paid "field allowances" to the police involved in the Korokoro attacks.

58. Upon information and belief, on or about December 1, 1993, SPDC Managing Director P.B. Watts requested approval by the Nigerian Police Inspector General for an increase in its security; promised to provide complete logistics, accoutrement and welfare support to the Nigerian police force; promised to fully support the cost of setting up and maintaining a police contingent of 550 men; and requested a quotation for the supply of semi-automatic rifles for vehicle and marine patrols.

59. Royal Dutch/Shell, acting through SPDC, publicly praised the co-operation and excellent working relationship developed over the years between the Nigerian Police Force and SPDC.

60. In April 1994, Nigerian security forces supported attacks on eight Ogoni villages and burned down the villages of Ledor on April 16 and Tumbe on April 18, 1994.

61. On or about April 21, 1994, Lieutenant Colonel Komo, the Head of Rivers State sent a memo to the head of the Internal Security Task Force detailing an extensive military presence and policy of military intervention in Ogoni, in order to ensure that those "carrying out business ventures . . . within Ogoniland are not molested."

62. On or about May 12, 1994, the Rivers State Internal Security Task Force, a military unit headed by Major Paul Okuntimo, reported that "Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence", and proposed that the Nigerian Police exert pressure on Shell for regular payments from Royal Dutch/Shell to support the operations.

63. On May 21, 1994, four Ogoni tribal leaders were killed.

64. Between May and August 1994, the Rivers State Internal Security Task Force mounted several months of nightly raids through at least sixty towns and villages in Ogoni, to punish entire communities for their support for MOSOP. During these raids, the military broke into homes, beating anyone in their path, including the elderly, women and children, raping, forcing villagers to pay "settlement fees," bribes and ransoms to secure their release, forcing the Ogonis to flee and abandon their homes, and burning, destroying or looting property. At least fifty Ogonis were killed.

65. Between May 1994 and August 1994, several hundred young Ogoni men were arrested, detained and flogged on a daily basis because of their real or imagined affiliation with MOSOP.

66. On or about May 22, 1994, Ken Saro-Wiwa was arrested and detained without charges by the Nigerian military and the arrest of the entire MOSOP leadership was ordered by the Rivers State military administrator.

67. Ken Saro-Wiwa, John Kpuinen and others were arrested because of their non-violent opposition to the activities of Royal Dutch/Shell and the Nigerian military regime.

68. No charges were filed against them for eight months after their arrest and detention.

69. In November, 1994, a three-man tribunal ("Civil Disturbances Special Tribunal") was created and specially appointed by the Nigerian military regime to try Ken Saro-Wiwa, John Kpuinen, and other Ogoni leaders for the May 21, 1994 murder of four Ogoni tribal leaders.

70. On or about March 16, 1995, on information and belief, top Shell executives of Shell International Petroleum Company, Ltd. ("SIPC") met in Shell Centre, London with the Nigerian High Commissioner, top Nigerian military officers to discuss common strategy regarding Ken Saro-Wiwa and the Ogoni campaign, including a joint media campaign and other action.

71. On March 18, 1995, the Civil Disturbances Special Tribunal assumed jurisdiction over the cases of ten additional Ogoni leaders who were formally charged with murder on April 7, 1995.

72. The creation of the Civil Disturbances Special Tribunal and the conduct of the ensuing trial violated customary international law because, inter alia:

a. An edict creating the Civil Disturbances Special Tribunal and providing the death penalty was given retroactive effect;

b. the Civil Disturbances Special Tribunal's judgment was not subject to review by a higher court;

c. the accused met with their counsel only with the permission of and in the presence of a military officer.

73. Defense counsel for the accused were subjected to threats of beatings and Ken Saro-Wiwa's 74-year-old mother, as well as other family members, were beaten when attending the Civil Disturbances Special Tribunal hearing.

74. The accused were denied adequate food and medical care, beaten and subjected to other torture.

75. Royal Dutch/Shell promised bribes to at least two key witnesses to give false testimony against Saro-Wiwa.

76. On January 4, 1995, soldiers dispersed peaceful demonstrations protesting Royal Dutch/Shell's operation and the arrest of Saro-Wiwa, Kpuinen and the others with shootings, beatings and arrests, extorting money from those who they released.

77. Those incarcerated as a result of the January 4, 1995 protest were subjected to floggings and other torture.

78. In June 1995, the team of defense lawyers representing Saro-Wiwa and Kpuinen withdrew from the proceedings as a protest against the flagrant violations of international standards of due process in the two concurrent trials.

79. Upon information and belief, Royal Dutch/Shell held meetings with the Nigerian military regime to discuss strategies concerning the unlawful execution of Saro-Wiwa.

80. Brian Anderson, the Managing Director of SPDC, and on information and belief, an employee and agent of Royal Dutch/Shell, met with Plaintiff Owens Wiwa and offered to trade Ken Saro-Wiwa's freedom for an end to the international protests against Defendants.

81. On or about October 30 and 31, 1995, Ken Saro-Wiwa, John Kpuinen, and seven other Ogoni activists were condemned to death by the military-appointed special tribunal, in violation of international law and the laws of Nigeria.

82. Ken Saro-Wiwa, John Kpuinen and the others scheduled for execution were beaten, denied food, water or bedding for a period of days prior to their execution.

83. On November 10, 1995, Plaintiffs Ken Saro-Wiwa and John Kpuinen were hanged.

84. On November 13, 1995, Plaintiff Owens Wiwa, who had previously been arrested and detained without charges, fled Nigeria because he feared arbitrary arrest, torture and death.

85. Plaintiff Owens Wiwa was forced to leave his medical clinic and his work as a doctor.

86. On December 15, 1995, Royal Dutch/Shell signed an agreement to invest $4 billion in a natural gas project in Nigeria.

87. Nineteen Ogonis remain in detention charged with murder in connection with the same allegations and before the same Civil Disturbances Special Tribunal that convicted Saro-Wiwa and Kpuinen.

88. Eighteen Ogonis, most held without trial since mid-1994, were charged in May 1995 on a "holding charge" of murder. Of those eighteen, one died in detention and two were released.

89. Four others were charged with murder in the magistrate's court on October 27, 1995.

90. Upon information and belief, Royal Dutch/Shell private police cooperated in the arrests, beatings and torture of some of the nineteen arrested.

91. The nineteen Ogonis continue to be detained without trial under conditions violative of minimum international standards.

92. Oil revenues provide 80% of Nigeria's federal government budget.

93. Oil from Nigeria accounts for approximately 14% of Royal Dutch/Shell's global oil production.

94. At all times relevant herein, Defendants Royal Dutch/Shell knew or should have known that the Nigerian regime, its army and police committed human rights abuses, including summary executions, in connection with the exploitation of oil in Ogoni and the Niger Delta.

General Allegations

95. The acts described herein were inflicted under color of law and under color of official authority, and/or in conspiracy with or on behalf of those acting under color of official authority.

96. The acts and injuries to Plaintiffs and their next-of-kin described herein were part of a pattern and practice of systematic human rights violations directed, ordered, confirmed, and/or ratified by Defendants and their agents and/or committed in conspiracy with the Nigerian military regime.

97. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have suffered and will continue to suffer harm including pain and suffering, and extreme and severe mental anguish and emotional distress. Plaintiffs are thereby entitled to general and compensatory damages in amounts to be proven at trial.

98. Plaintiffs' causes of action arise under and violate the following laws, agreements, conventions, resolutions and treaties:

(a) Alien Tort Claims Act, 28 U.S.C. § 1350;

(b) Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968;

(c) Customary international law;

(d) United Nations Charter, 59 Stat. 1031, 3 Bevans 1153 (1945);

(f) Universal Declaration of Human Rights, G.A. Res. 217A(iii), U.N. Doc. A/810 (1948);

(g) International Covenant on Civil and Political Rights, G.A. Res. 2220A(xxi), 21 U.N. Doc., GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966);

(h) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. Doc., GAOR Supp. (No. 51) at 1100, U.N. Doc. A/39/51 (1984);

(i) Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. Doc., GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1976);

(j) Common law of the United States of America;

(k) Statutes and common law of the State of New York, including but not limited to wrongful death, assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence; and the

(l) Laws of Nigeria.

99. There is no independent functioning judiciary in Nigeria and any suit against Defendants there would have been and would still be futile and would result in serious reprisals.

FIRST CLAIM FOR RELIEF
(Summary execution)

100. The allegations set forth in paragraphs 1 through 99 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

101. The deliberate killings, under color of law, of Ken Saro-Wiwa and John Kpuinen were not authorized by a lawful judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

102. The acts described herein constitute summary execution in violation of the Alien Tort Claims Act, customary international law, the common law of the United States, the statutes and common law of New York, the laws of Nigeria, and the international treaties, agreements, conventions and resolutions described in paragraph 98 herein.

103. Defendants Royal Dutch/Shell are liable for the killings in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the deaths of Ken Saro-Wiwa and John Kpuinen.

SECOND CLAIM FOR RELIEF
(Crimes Against Humanity)

104. The allegations set forth in paragraphs 1 through 103 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

105. The acts described herein against Plaintiffs constitute crimes against humanity, in violation of customary international law which prohibits inhumane acts of a very serious nature such as willful killing, torture and arbitrary arrest and detention and other inhumane acts committed as part of a widespread or systematic attack against any civilian population or persecutions on political, racial or religious grounds. Leaders, organizers, instigators and accomplices participating

in the formulation of these acts are responsible for all acts performed by any person in execution of such plan.

106. The acts described herein constitute crimes against humanity in violation of the Alien Tort Claims Act, customary international law, the common law of the United States, the statutes and common law of New York, the laws of Nigeria, and the international treaties, agreements, conventions and resolutions described in paragraph 98 herein.

107. Defendants Royal Dutch/Shell are liable to Plaintiffs for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the crimes against humanity committed against Plaintiffs.

THIRD CLAIM FOR RELIEF
(Torture)

108. The allegations set forth in paragraphs 1 through 107 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

109. The tortures of Ken Saro-Wiwa, John Kpuinen and Jane Doe, as described herein were inflicted deliberately and intentionally for purposes which included, among others, punishing the victim or intimidating the victim or third persons.

110. The acts described herein constitute torture in violation of the Alien Tort Claims Act, customary international law, the common law of the United States, the statutes and common law of New York, the laws of Nigeria, and the international treaties, agreements, conventions and resolutions described in paragraph 98 herein.

111. Defendants are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the Nigerian military regime in bringing about the torture of Ken Saro-Wiwa, John Kpuinen and Jane Doe.

FOURTH CLAIM FOR RELIEF
(Cruel, Inhuman, or Degrading Treatment)

112. The allegations set forth in paragraphs 1 through 111 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

113. The acts described herein had the intent and the effect of grossly humiliating and debasing the Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, breaking physical or moral resistance, and forcing them to leave their home and country and flee into exile.

114. The acts described herein constitute cruel, inhuman or degrading treatment in violation of the Alien Tort Claims Act, customary international law, the common law of the United States, the statutes and common law of New York, the laws of Nigeria, and the international treaties, agreements, conventions and resolutions described in paragraph 98 herein.

115. All Plaintiffs were placed in great fear for their lives and forced to suffer severe physical and psychological abuse and agony.

116. Defendants Royal Dutch/Shell are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime to cause the cruel, inhuman or degrading treatment of Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, and Blessing Kpuinen.

FIFTH CLAIM FOR RELIEF
(Arbitrary Arrest and Detention)

117. The allegations set forth in paragraphs 1 through 116 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

118. The arbitrary arrests and detention of Ken Saro-Wiwa, John Kpuinen and Owens Wiwa were illegal and unjust, and in violation of customary international law.

119. Plaintiffs Ken Saro-Wiwa, John Kpuinen and Owens Wiwa were placed in fear for their lives, were deprived of their freedom, separated from their families and forced to suffer severe physical and mental abuse.

120. The acts described herein constitute arbitrary arrest and detention in violation of the Alien Tort Claims Act, customary international law, the common law of the United States, the statutes and common law of New York, the laws of Nigeria, and the international treaties, agreements, conventions and resolutions described in paragraph 98 herein.

121. Defendants Royal Dutch/Shell are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the arbitrary arrests and detention of Ken Saro-Wiwa, John Kpuinen and Owens Wiwa.

SIXTH CLAIM FOR RELIEF
(Violation of the Rights to Life, Liberty and Security of Person and Peaceful Assembly and Association)

122. The allegations set forth in paragraphs 1 through 121 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

123. The beating and shooting of Plaintiff Jane Doe when she was peacefully demonstrating against the actions of Defendants constitute violations of her rights to life, liberty and security of person, and her rights to peaceful assembly and association.

124. The arrest, detention, and executions of Ken Saro-Wiwa and John Kpuinen were violations of their rights to life, liberty and security of person and peaceful assembly and association for which Defendants Royal Dutch/Shell are liable.

125. The arrest and detention of Owens Wiwa were violations of his rights to liberty and security of person and

peaceful assembly and association for which Defendants Royal Dutch/Shell are liable.

126. The acts described herein constitute violations of Plaintiffs' rights to life, liberty and security of person, and to peaceful assembly and association, in violation of the Alien Tort Claims Act, customary international law, the common law of the United States, the statutes and common law of New York, the laws of Nigeria, and the international treaties, agreements, conventions and resolutions described in paragraph 98 herein.

127. Defendants Royal Dutch/Shell are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the violations of the rights to life, liberty and security of person and peaceful assembly and association.

SEVENTH CLAIM FOR RELIEF
(Wrongful Death)

128. Plaintiffs Ken Wiwa and Blessing Kpuinen on behalf of their deceased relatives, Ken Saro-Wiwa and John Kpuinen, reallege and incorporate by reference the allegations set forth in paragraphs 1 through 127 as if fully set forth herein.

129. Plaintiff Ken Wiwa is the natural son of Ken Saro-Wiwa and his heir at law.

130. Plaintiff Blessing Kpuinen is the widow of John Kpuinen and his heir at law.

131. As a direct result of the Defendants' acts and omissions and as a result of the death of his father, Plaintiff Ken Wiwa has sustained pecuniary loss resulting from loss of society, comfort, attention, services and support of decedent Ken Saro-Wiwa.

132. As a direct result of the Defendants' acts and omissions and as a result of the death of her husband, Plaintiff Blessing Kpuinen has sustained pecuniary loss resulting from

loss of society, comfort, attention, services and support of decedent John Kpuinen.

133. Defendants Royal Dutch/Shell are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the wrongful deaths of Ken Saro-Wiwa and John Kpuinen.

134. The acts described herein constitute wrongful death, actionable under the laws of New York, the United States and Nigeria.

EIGHTH CLAIM FOR RELIEF
(Assault and Battery)

135. The allegations set forth in paragraphs 1 through 134 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

136. As a result of these acts, Plaintiffs were placed in great fear for their lives and suffered severe physical and psychological abuse and agony.

137. Defendants' acts were willful, intentional, wanton, malicious and oppressive.

138. Defendants are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the assault and battery of Ken Saro-Wiwa, Owens Wiwa, John Kpuinen, Blessing Kpuinen, and Jane Doe.

139. The acts described herein constitute assault and battery, actionable under the laws of New York, the United States and Nigeria.

NINTH CLAIM FOR RELIEF
(Intentional Infliction of Emotional Distress)

140. The allegations set forth in paragraphs 1 through 139 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

141. The acts described herein constitute outrageous conduct in violation of all normal standards of decency and were without privilege or justification.

142. These outrageous acts were intentional and malicious and done for the purposes of causing Plaintiffs to suffer humiliation, mental anguish and extreme emotional and physical distress.

143. As a result of Defendants' acts, Plaintiffs were placed in great fear for their lives and were forced to suffer severe physical and psychological abuse and agony.

144. Defendants are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the intentional infliction of emotional distress of Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Blessing Kpuinen, and Jane Doe.

145. Defendants' outrageous conduct constitutes the intentional infliction of emotional distress and is actionable under the laws of New York, the United States and Nigeria.

TENTH CLAIM FOR RELIEF
(Negligent Infliction of Emotional Distress)

146. The allegations set forth in paragraphs 1 through 145 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

147. The actions of Defendants, and each of them, constituted a negligent infliction of emotional distress upon said Plaintiffs.

148. Defendants, and each of them, carelessly and negligently inflicted said emotional distress through a wanton and reckless campaign of harassment and intimidation.

149. Defendants are liable for said conduct in that Defendants directed, ordered, confirmed, ratified, and/or conspired with the military regime in bringing about the negligent infliction of emotional distress of Ken Saro-Wiwa, John Kpuinen, Owens Wiwa, Blessing Kpuinen, and Jane Doe.

150. As a direct and legal result of Defendants' wrongful acts, Plaintiffs have suffered and will continue to suffer significant physical injury, pain and suffering and extreme and severe mental anguish and emotional distress.

151. Defendants' conduct constitutes the negligent infliction of emotional distress and is actionable under the laws of New York, the United States and Nigeria.

ELEVENTH CLAIM FOR RELIEF
(Negligence)

152. The allegations set forth in paragraphs 1 through 151 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

153. Defendants failed to use ordinary or reasonable care in order to avoid injury to Plaintiffs. Defendants' negligence was a cause of injury, damage, loss or harm to Plaintiffs and their next of kin.

154. Defendants' conduct constitutes negligence and is actionable under the laws of New York, the United States, and Nigeria.

TWELFTH CLAIM FOR RELIEF
(Violations of the Racketeer Influenced and Corrupt Organizations Act)

155. The allegations set forth in paragraphs 1 through 154 of this Complaint are realleged and incorporated by reference as if fully set forth herein.

156. From not later than 1990 to the present, Defendants Royal Dutch Petroleum Company, Shell Transport and Trading Company, p.l.c., and their agents and co-conspirators formed a RICO "enterprise" within the meaning of 18 U.S.C. § 1961(4) engaged in foreign and interstate commerce.

157. Alternatively, Defendants and their agents and co-conspirators constituted an association in fact for a common purpose with a continuous existence separate and apart from the pattern of racketeering activity in which they engaged. This association in fact constituted an enterprise within the meaning of 18 U.S.C. § 1961(4).

158. Each Defendant is an "individual or entity capable of holding a legal or beneficial interest in property" and, as such, each constitutes a "person" within the meaning of 18 U.S.C. § 1961(3).

159. The Defendants are engaged in interstate acts of commerce and the acts alleged herein have a potential effect on commerce.

160. Over a period of years and continuing to the present, Defendants with their co-conspirators or agents, in violation of 18 U.S.C § 1962(b) through a pattern of racketeering activity, have acquired and maintained an interest in petroleum exploration and exploitation projects in Nigeria.

161. At all times relevant to this Complaint, the Defendants, and their agents and co-conspirators conducted, or participated directly or indirectly in the conduct of the affairs of the enterprise through a pattern of racketeering activity,

within the meaning of 18 U.S.C. § 1961 (1) (5), in violation of 18 U.S.C. § 1962 (c).

162. At all times relevant to this Complaint, the Defendants Royal Dutch/Shell, in violation of 18 U.S.C. § 1962(d) combined and conspired together and with their agents and co-conspirators to commit conduct the affairs of the enterprise through a pattern of racketeering activity.

163. In furtherance of the conspiracy, and to effect the objects thereof, the Defendants committed overt acts as set forth more fully in paragraphs 1 through 162.

164. During 1992 and 1993, in violation of 18 U.S.C §§ 1962(c) and (d), Defendants, with their agents and co–conspirators, conspired to and did conduct the affairs of the enterprise through a pattern of racketeering activity.

165. The pattern of racketeering activity alleged in paragraphs 1 through 98 above included the following specific acts, all of which constituted and are defined as racketeering activity by 18 U.S.C. § 1961(1) and all of which are set forth in the specific numbered paragraphs herein which are realleged and incorporated here by reference as if fully set forth, as follows:

a) arson;

b) murder;

c) bribery;

d) wire fraud, 18 U.S.C. § 1343;

e) extortion, 18 U.S.C.§ 1951.

166. It was the object of the extortion to force Plaintiffs Owens Wiwa and Jane Doe to surrender their property.

167. Defendants' acts alleged herein have substantial effect within the United States.

168. As a direct and proximate result of the Defendants' violations of 18 U.S.C. §§ 1962 (b), (c) and (d) Plaintiff Jane Doe has suffered an injury to her business or property.

169. As a direct and proximate result of the Defendants Royal Dutch/Shell's violations of 18 U.S.C. §§ 1962 (b), (c) and (d) Plaintiff Owens Wiwa has suffered an injury to his business or property.

170. The injuries suffered by each Plaintiff were reasonably foreseeable or anticipated by the Defendants as the natural consequence of Defendants' acts.

PRAYER FOR RELIEF

WHEREFORE, each and every Plaintiff prays for judgment against Defendant Royal Dutch Shell and Defendant y Shell Transport and Trading Company, p.l.c., in excess of $50,000, as follows:

(a) for compensatory damages;

(b) for punitive damages;

(e) for treble damages;

(d) for costs of suit, attorneys fees and such other relief as the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiffs hereby demand a jury trial on all issues so triable.

Dated: April 29, 1997
New York, NY

Respectfully submitted,

By /s/ Jennifer M. Green

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APPENDIX H

DECLARATION OF PROFESSOR JOHN C. COFFEE, JR., DATED SEPTEMBER 24, 1997, IN NO. 96 CIV. 8386 (FILED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEN WIWA, et. al., Plaintiffs v. ROYAL DUTCH PETROLEUM COMPANY, et. al., Defendants.	96 Civ. 08386 (KMW) Before Magistrate Judge Henry B. Pitman

DECLARATION OF
PROFESSOR JOHN C. COFFEE, JR.

JOHN C. COFFEE, JR., declares a follows:

1. I am the Adolf A. Berle Professor of Law at Columbia University Law School, where my principal area of specialization is corporate and securities law. I have recently served as a member of the SEC's Advisory Committee on the Capital Formation and Regulatory Processes and as a member of the Subcouncil on Capital Markets of the United States Competitiveness Policy Council. I have been a member of the Legal Advisory Committee to the Board of Directors of the New York Stock Exchange's ("NYSE") (and continue as an adjunct member) and am a current member of the Legal Advisory Board to the National Association of Securities Dealers ("NASD"). I am also a member of the Market Practices Committee of NASD Regulation, Inc., which exercises disciplinary authority over broker dealers. I am a co-author of Jennings, Marsh & Coffee, SECURITIES REGULATION: Cases and Materials (Seventh Edition 1992), Choper, Coffee & Gilson, CASES AND MATERIALS ON CORPORATIONS (Fourth ed. 1995), and Klein and Coffee,

BUSINESS ORGANIZATION AND FINANCE (Fifth edition 1995). I am member of the Executive Committee of the Securities Regulation Institute, have been employed this year by the Federal Judicial Center to lecture before federal district judges on securities law, and have written widely on the topics of securities law and the securities markets (including as a regular columnist for the New York Law Journal and the National Law Journal).

2. I make this declaration exclusively with reference to Plaintiffs' assertion that the actions of Royal Dutch Petroleum Company ("Royal Dutch") and Shell Transport and Trading Company, p.l.c. ("Shell") in maintaining listings on the New York Stock Exchange and conducting normal investor relation programs through others should subject them to personal jurisdiction in the Southern District of New York. In so doing, I have reviewed the Declaration of Edward S. Herman, dated August 26, 1997, and Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss The Amended Complaint.

3. As discussed below, my principal conclusions are that Plaintiffs' legal theory, of personal jurisdiction based on a stock exchange listing, if accepted, would not only reverse settled precedent, but would (1) injure the interests of the United States by diminishing the ability of the New York Stock Exchange, which is in very active competition for foreign listings with the London Stock Exchange, to secure foreign listings and rival London as the world's primary global securities market; (2) prejudice U.S. investors by making it more difficult for them to diversify their stock portfolios or invest in foreign equities; (3) create an arbitrary and unfortunate distinction between the New York Stock Exchange and "electronic" markets, such as NASDAQ, Instinet, and the newly emerging Fourth Market (all of which have no true physical location for listing purposes), and (4) potentially overload the dockets of courts in the Southern District of New York by making it the single jurisdiction in the world where

most global corporations could be sued (regardless of their business location or activities) because of their NYSE listing.

4. At the outset, I note that Professor Herman seeks in his Declaration to support Plaintiffs' position by stating that a NYSE listing "provides a corporation with superior access to the large American capital market." (Paragraph 8). This is a potentially misleading statement, because it ignores the basic distinction between the primary market and the secondary market. Professor Herman compounds his inattention to this distinction by opening his Declaration with the statement that "Corporations make public offerings of their stocks in order to raise funds for investment..." (See Paragraph 4). To be sure, they do, but they do so in the primary market (that is, by direct sales, or sales through underwriters, to investors). In contrast to primary market transactions (i.e., transactions between the issuer and investors), a secondary market (such as the NYSE) simply trades outstanding shares between shareholders. That is, the corporation does not typically raise funds in it or through it.

5. This is certainly true in the case of Royal Dutch and Shell, as I am informed that neither company has had a primary offering in the United States since 1959. Thus, the NYSE has not served (at least for the last 38 years) as a mechanism by which either defendant raises capital in the U.S. capital markets. Rather, the defendants are essentially bystanders as shareholders trade their securities among themselves, but without the proceeds going to the defendants. The stock of both companies is also traded on other stock exchanges, and for neither company is the NYSE even the principal secondary market for its common stock. Thus, while their NYSE listings accommodate American investors, it is an overstatement to conclude that such listings give the Defendants significant access to the U.S. capital markets (which access would require them to register their securities with the SEC for primary offerings).

6. In general, foreign corporations have been reluctant to enter the U.S. equity markets because of their fear of U.S.-style litigation. Even major foreign companies (many of which can easily satisfy--and do satisfy--the more rigorous accounting requirements of U.S. securities law) appear to avoid entry into the U.S. capital markets where they believe they will be potentially subject to class actions and large punitive damage awards. Even if the fears of such issuers are exaggerated, the upshot for U.S. public investors is that they are denied access to primary offerings by many foreign corporations. This visits an injury on U.S. investors because equity securities sold in primary offerings are often sold at a discount to the secondary market price (which discount is not available to U.S. investors when the offering is kept out of the United States). To be sure, large institutional investors can go offshore and buy in exempt extraterritorial offerings (which are typically structured to comply with the SEC's Regulation S in order to be largely exempt from the U.S. federal securities laws), but the smaller public investor cannot.

7. This problem is compounded for U.S. investors if foreign corporations decline to list on the New York Stock Exchange or actually delist (which I consider to be a realistic danger if a federal court were to hold that listing on the New York Stock Exchange plus incidental activities thereto subjects a foreign corporation to jurisdiction in New York). It should be understood (and beyond argument) that a rational investor wants to hold a diversified portfolio. Efficient diversification requires that a portfolio be distributed not only among industries and classes of securities, but also among national economies (in order to diversify away nation state risks). As of a recent date (year-end 1994), it was estimated by economists at the NYSE that approximately 5.5% of U.S. investors' holdings are in foreign equities. See Cochrane, Shapiro & Tobin, Foreign Equities and U.S. Investors: Breaking Down The Barriers Separating Supply and Demand (NYSE Working Paper No. 95-04) (1994) at p.4. Although this statistic shows

that U.S. investors desire to hold foreign equities, it also reflects a level of current holdings that in my judgment is probably somewhat below the level that efficient diversification requires. This, in turn, suggests that there are still significant barriers to truly internationalized securities markets. See also Grundfest, Internationalization of the World's Securities Markets: Economic Causes and Regulatory Consequences, 4. J. Financial Services Research 349 (1990) (discussing remaining barriers). To the extent that foreign corporations otherwise eligible for listing on the New York Stock Exchange are deterred from listing by the threat of litigation in the United States with regard to alleged activities outside the United States, U.S. investors lose. In effect, the transaction costs go up that they (or those acting on their behalf, such as pension and mutual funds) must incur to achieve efficient diversification.

8. Similarly, there is a corresponding loss to the U.S. economy. The financial services industry is one of the United States most successful and internationally competitive industries. Yet, the market for financial services is increasingly international in character, and foreign competitors are given a material advantage by any legal rule that makes the New York Stock Exchange less attractive to foreign corporations.

9. At present, the London Stock Exchange is the world's dominant stock exchange in terms of the number of foreign corporations listed on it.[1] This may reflect both its lesser regulatory standards and the lower risk of litigation in the U.K. See Note, London Calling?: A Comparison of London and U.S. Stock Exchange Listing Requirements, 6 Duke J. Comp. & Int'l L. 197 (1995) (noting substantially lesser regulatory requirements on the LSE). Nonetheless, in recent years, the

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[1] Technically, the London Stock Exchange is officially known as the International Stock Exchange of the United Kingdom and Republic of Ireland, Ltd. In popular parlance, however, it continues to be called the London Stock Exchange.

NYSE has become an increasingly effective competitor and has closed much of the gap between them. At the end of 1994, 464 foreign corporations (i.e. non-U.K. corporations) had their shares listed on the London Stock Exchange.[2] In contrast, New York Stock Exchange statistics show that there are currently 318 foreign corporations (i.e., non-U.S. firms) listed on the New York Stock Exchange (out of a total of 2705 "listed" firms--or 12%). Both London and New York also trade depositary receipts (known as ADRs (American Depositary Receipts) or GDRs (Global Depositary Receipts)). Again, the competition for trading is intense between the LSE and the NYSE. According to published reports, one out of four new listings on the NYSE this year has been a foreign corporation, and the NYSE estimates that there are at least some 500 to 600 non-U.S. firms eligible for NYSE listing that it hopes to encourage to list by the year 2000. See Suzanne Woolley, "The Booming Big Board", Business Week, August 11, 1997.

10. This competition between the NYSE and the London Stock Exchange is not simply a private game without public policy implications or significance for others. As the NYSE wins foreign stock listings, U.S. investment banking and financial services firms gains business. Already, this has happened in the wave of mass privatizations that transitional economies are currently undergoing. Once traded in a U.S. equity market, foreign firms are more likely to employ U.S. underwriters for offerings and U.S. investment bankers (and lawyers) for acquisitions and restructurings. In this light, the NYSE's current goal of 500 to 600 foreign listings by the year 2000 could have a measurable impact on the U.S. GNP.

11. Conversely, if foreign corporations delist on the NYSE, this would have negative implications for the health of the U.S. financial services industry. Given the close competition that already exists between the London Stock Exchange and the NYSE, a perception that a corporation that

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[2] See London Calling?, supra, at 227 n. 180.

lists on the NYSE is at risk to be sued in New York for activities anywhere in the world would be a heavy thumb on the scales. It would mean that in addition to the far less regulatory climate in London (in terms of accounting and securities law requirements), there would be a new and unquantifiable risk of class action and other litigation for non-securities liabilities, if a foreign corporation listed on the NYSE.

12. Another impact of a legal rule that attaches weight to a stock exchange listing for jurisdictional purposes is to affect the competition between the NYSE and NASDAQ for stock listings. This competition is also intense today (and the NYSE has been winning new listings from NASDAQ at a record rate this year). But, because NASDAQ is an electronic market with no actual physical address, listing on it is less likely to subject any corporation (foreign or domestic) to personal jurisdiction in any particular U.S. district court. Thus, NASDAQ gains an arbitrary advantage over the NYSE, and the playing field between them is made less level.

13. A last factor that merits consideration is the extraordinary number of major foreign corporations and U.S. corporations not currently subject to jurisdiction in New York that would become subject to suit in the Southern District of New York under Plaintiffs' legal theory. Already, there are 318 foreign "listed" corporations traded on the NYSE plus 540 foreign corporations that (like Shell) trade their depositary receipts on the NYSE (or a total of 858 foreign corporations whose securities are traded). In additions, of the nearly 3,000 common stocks currently traded on the NYSE, there are an unknown number of U.S. companies that currently do not transact business in New York and are not subject to personal jurisdiction here today. By definition, each of these companies is large (in order to qualify for a NYSE listing) and probably has activities somewhere that under some theory could give rise to litigation. For plaintiffs, it might be expensive and difficult to sue these corporations in their home jurisdictions, but it is

simple and attractive to do so in New York. The result would likely be to create a universal forum in the Southern District for world-wide litigation. The impact on docket lengths in the Southern District, however, would be predictably adverse.

14. In conclusion, I recognize that this action is not primarily about corporate and securities law. Nonetheless, its principal impact might well be on the securities markets if the long-standing rule were reversed that an NYSE listing did not provide a basis for establishing personal jurisdiction in New York.

15. I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed in New York, N.Y.
on September 24, 1997

/s/ John C. Coffee, Jr.
John C. Coffee, Jr.

(2)

Supreme Court, U.S.
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No. 00-1168

IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY, *et al.*,
Petitioners,

v.

KEN WIWA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals properly applied the *forum non conveniens* balancing test mandated by *Piper Aircraft Co. v. Reyno* and *Gulf Oil Corp. v. Gilbert* in this case.

(2) Whether a federal district court may exercise personal jurisdiction over a corporation that maintains a substantial and continuous corporate presence in New York by employing a local agent and funding a local Investor Relations Office that invests more than half a million dollars annually to promote U.S. investor-related activity.

(3) Whether a federal district court may exercise original jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), over a suit by an alien, for torts only, committed in violation of the law of nations.

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IN THE

Supreme Court of the United States

No. 00-1168

Royal Dutch Petroleum Co., *et al.*,

Petitioners,

vs.

Ken Wiwa, *et al.*,

Respondents.

BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Respondents Ken Wiwa, *et al.*, oppose Royal Dutch Petroleum's and Shell Transport's petition for a writ of certiorari because the decision below is correct and warrants no further review, particularly in its current interlocutory posture. Petitioners seek review of a unanimous, fact-specific preliminary ruling, which correctly applies settled law, upon which the circuits are not divided, which presents no extraordinary issue, and which simply remands for proceedings on a motion to dismiss that is currently pending before the U.S. District Court for the Southern District of New York.

Petitioners now ask this Court to disrupt these orderly proceedings to consider four questions – some of them subsumed within their ongoing district court motion – none of which comes close to the "compelling reasons" required by

Supreme Court Rule 10. Review of any of these questions would be entirely premature and a waste of this Court's resources.

Petitioners' first two Questions Presented, *see* Pet. at (i), challenge a correct, unremarkable, and fact-specific application of this Court's well-settled *forum non conveniens* decisions in *Piper Aircraft Co v. Reyno*, 454 U.S. 235 (1981) and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Their third question challenges a fact-specific issue correctly decided below: that a federal district court may exercise personal jurisdiction over a corporation that maintains a substantial and continuous corporate presence in New York, by, *inter alia*, conducting activities there through its agent, bearing the full expenses of an Investor Relations Office in New York that invests more than half a million dollars annually in promoting U.S. investor-related activity, and employing a manager in New York who organizes meetings in New York.

Finally, petitioners' fourth question appends to their fact-specific venue challenge a novel assault on the district court's subject matter jurisdiction.[1] Petitioners now ask this Court to reach out to overturn a decades-old line of precedent, which is plainly correct, supported by more than two hundred years of judicial, legislative, and executive interpretation, and follows an unbroken line of federal court rulings implementing the unambiguously stated will of Congress in both the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) ("ATCA") and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 Notes (2000) ("TVPA"). Following the ATCA's precise words, the

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[1]This issue was never raised, briefed nor argued below until the petition for rehearing *en banc*, only then to be rejected by the full Second Circuit without comment. (App. E-1.)

lower courts reaffirmed without dissent that a federal district court may exercise original subject matter jurisdiction over a suit by aliens, for torts only, committed in violation of the law of nations. On remand, the District Court is currently examining whether petitioners' actions alleged in this case constitute tortious conduct in violation of the law of nations for purposes of the ATCA. Should petitioners persuade the District Court that no such violations of the law of nations occurred here, the Court below would be free to dismiss this suit for lack of subject matter jurisdiction, precisely the result that petitioners would now have this Court dictate.

Significantly, petitioners question only one of three grounds of subject matter jurisdiction cited in respondents' amended complaint. Thus, even if this Court were to grant certiorari and preemptively eliminate subject matter jurisdiction based on the ATCA, the lower court would still have to consider two alternate grounds for subject matter jurisdiction, the general federal question provision of 28 U.S.C. § 1331 (2000) and the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2000) ("RICO"). Substantial pretrial orders have been issued by the District Court, and the factual record will soon be expanded on remand. Should respondents win at trial and again on appeal, this Court would be free to review the entire judgment – including all jurisdictional rulings – on a fully developed record, avoiding the needless piecemeal litigation that granting this interlocutory petition would engender.

In sum, petitioners present no reason why this Court should prematurely intervene to reassess facts correctly determined by the lower courts or to prejudge a motion to dismiss that is currently before the District Court. This Court

should deny petitioners' invitation to waste its scarce resources on such pointless interlocutory and advisory review.

STATEMENT OF THE FACTS

I. Background

Respondents Ken Wiwa, Owens Wiwa, Jane Doe, and Blessing Kpuinen are Nigerian nationals.[2] Petitioners Royal Dutch Petroleum Co. and "Shell" Transport and Trading Company P.L.C. are Dutch and British holding companies, which together operate and control the Royal Dutch/Shell Group, a multinational, vertically integrated network of affiliated oil and gas companies that includes Shell Petroleum Development Company of Nigeria, Ltd. ("SPDC"), a wholly-owned Nigerian subsidiary. (App. A-3.) SPDC engages in extensive oil exploration and development activity in the Ogoni region of Nigeria. (App. A-3.)

According to the amended complaint, whose allegations must be taken as true for purposes of this petition, respondents and their next of kin were imprisoned, tortured, and killed by the Nigerian government in violation of the law of nations at the instigation of petitioners, in reprisal for their political opposition to SPDC's oil exploration activities in Nigeria. SPDC coercively expropriated land in the Niger Delta for oil development without adequate compensation, substantially polluting the air and water in the homeland of the Ogoni people. (App. A-3 to A-4.)

Ken Saro-Wiwa, respondent Owens Wiwa's brother and Ken Wiwa's father, became an outspoken opposition leader and

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[2]Kpuinen and Owens Wiwa lived in the United States at the time that petitioners' motion to dismiss was filed in this case. (App. A-7.)

President of the Movement for the Survival of the Ogoni People ("MOSOP"), a human rights organization established to protect the rights of the Ogoni people. Blessing Kpuinen's husband, John, became a leader of MOSOP's youth wing. Over time, SPDC recruited the Nigerian police and military to attack local villages and to suppress organized opposition to its development activity. (App. A-4.) Saro-Wiwa and John Kpuinen were repeatedly arrested, detained, and tortured by the Nigerian government because of their leadership roles in the protest movement. (App. A-4.)

In spring 1995, petitioners' agents met with top Nigerian military officers to discuss common strategy regarding Saro-Wiwa and the Ogoni campaign, and to plan a joint media campaign. (App. G-13.) Petitioners promised bribes to at least two key witnesses to give false testimony against Saro-Wiwa and held meetings with the Nigerian military regime to discuss strategies concerning the unlawful execution of Saro-Wiwa. (App. A-5; App. G-14.) Brian Anderson, the Managing Director of SPDC and an agent of Royal Dutch/Shell, met with respondent Owens Wiwa and offered to trade Saro-Wiwa's freedom for an end to the international protests against petitioners. (App. G-14.)

In November 1995, Saro-Wiwa and Kpuinen were hanged, along with other Ogoni leaders, after being convicted of murder by a special military tribunal, based on fabricated evidence and without due process protections. (App. A-4; App. G-15.) Respondent Owens Wiwa was illegally detained by Nigerian authorities; respondent Jane Doe was beaten and shot by the Nigerian military while protesting the destruction of her property during a 1993 raid upon her village. (App. A-4.) These abuses, carried out by the Nigerian government and military, were instigated, orchestrated, planned, and facilitated

by SPDC under the direction of Royal Dutch/Shell. (App. A-4.) Petitioners directly or indirectly provided money, weapons, intelligence, and logistical support to the Nigerian military – including the motor vehicles, patrol boats, and ammunition used in village raids – and participated in the campaign to fabricate murder charges, to arrest and execute Saro-Wiwa and Kpuinen, and to bribe two witnesses to give false testimony against them. (App. A-4 to A-5; App. G-7 to G-8.)

II. Proceedings Below

Respondents filed this action on November 8, 1996 (followed later by an amended complaint), invoking federal question jurisdiction under 28 U.S.C. § 1331, and seeking damages against petitioners under the Alien Tort Claims Act, RICO, international law and treaties, Nigerian law, and various state law torts. (App. A-6.) The ATCA states that "the district courts shall have original jurisdiction of *any* civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added). Following the ATCA's precise words, respondents alleged that petitioners had committed torts in violation of the law of nations, including summary execution; crimes against humanity; torture; cruel, inhuman, or degrading treatment; arbitrary arrest and detention; and violations of the rights to life, liberty, security of the person, and peaceful assembly and association. (App. A-6 to A-7.)

Petitioners filed a motion to dismiss for lack of personal jurisdiction, *forum non conveniens*, and failure to state a claim upon which relief could be granted. The United States District Court for the Southern District of New York (Wood, J.) found that personal jurisdiction over the petitioners was established under New York law by virtue of their maintenance of an Investor Relations Office in New York, but granted petitioners'

motion to dismiss for *forum non conveniens* to the United Kingdom, subject to certain conditions.

On respondents' appeal, the United States Court of Appeals for the Second Circuit (Leval, Oakes & Pooler, JJ.) reversed and remanded to the District Court for further proceedings. The panel (1) ruled that the District Court had correctly found personal jurisdiction, based, *inter alia,* on the fact that petitioners' Investor Relations Office was continuously present and hence "doing business" in the State of New York, and (2) reversed the dismissal for *forum non conveniens*, reasoning that the District Court had misapplied this Court's decisions in *Piper* and *Gilbert.* In particular, the panel found that the lower court had given too little weight to three of the *Piper* factors: the U.S. resident plaintiffs' choice of forum, the interests of the United States in furnishing a forum to litigate congressionally recognized claims for torts in violation of the law of nations, and the relative inconvenience of pursuing the case before a British court. The Court of Appeals remanded to the District Court to consider petitioners' motion to dismiss for failure to state a claim upon which relief can be granted, which includes a challenge to subject matter jurisdiction under the ATCA.[3] (App. A-34.) Without dissent, the Second Circuit denied both rehearing and rehearing *en banc.* (App. E-1.) On February 16, 2001, petitioners filed their renewed motion to dismiss before the District Court, where it is currently awaiting decision.

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[3]The Second Circuit expressed no view on a range of petitioners' objections – including the Act of State and political question doctrines and choice of law – upon which the District Court had deferred judgment.

REASONS FOR DENYING THE WRIT

The writ should be denied because review of the Second Circuit's decision would be premature and a waste of this Court's scarce resources. Petitioners identify no "compelling reasons" warranting review at this stage, *see* SUP. CT. R. 10, nor any issues on which the circuits are divided. Prudential considerations bar review of the four questions raised by petitioners, all of which address issues that are either fact-specific or governed by clear and uncontroversial holdings of this Court. This Court should not sit as a court of error to redo the court of appeals' unremarkable determinations regarding *forum non conveniens* and personal jurisdiction, nor should it issue an advisory ruling regarding the ATCA, when a motion challenging jurisdiction under that act is currently pending before the District Court.

I. CERTIORARI REVIEW IS PREMATURE

Petitioners seek review of a unanimous interlocutory ruling that simply remands for pretrial proceedings that are currently ongoing before the District Court. To interrupt these proceedings would ensnare this Court in fact-specific questions that ought not be reviewed absent a fuller factual record. This Court grants petitions for certiorari "only for compelling reasons," SUP. CT. R. 10, and reviews interlocutory orders "sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).[4]

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[4]As Justice Scalia recently noted, "[W]e generally await final judgment in the lower courts before exercising our jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of certiorari) (citations omitted). Denying certiorari would "import[]

This concern applies with special force to petitioners' Question Four, a subject-matter jurisdiction challenge that petitioners concede was never raised, briefed, argued, nor decided before their petition for rehearing *en banc*. Pet. at 12 n.8. Even when this Court clearly has the power to do so, it does not gratuitously reach out to decide questions that were "neither raised nor resolved" in earlier proceedings in the same case. *Glover v. United States*, – U.S. –, 121 S. Ct. 696, 701 (Jan. 9, 2001).[5] Even if this Court "may have jurisdiction to consider an issue not raised below, it is generally reluctant to do so," so that the lower courts may first pass on the question, thus giving this Court an adequate factual and legal record for certiorari review. *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984).

For three reasons, granting certiorari here to consider the propriety of subject matter jurisdiction under the ATCA would be particularly pointless. First, two alternative statutory bases for subject matter jurisdiction exist: the general federal question provision, 28 U.S.C. § 1331, and RICO. (App. G-3.) Thus, even if this Court were to grant certiorari specifically to deny the existence of subject matter jurisdiction under the ATCA, this case could still proceed to judgment under the alternative bases of jurisdiction, potentially returning to this Court later for post-judgment review. Second, petitioners grossly distort the truth by

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no expression of opinion upon the merits of [the] case," but rather, would ensure that the lower courts and, if need be, this Court would ultimately review this case on a fully developed, not fragmented, record. *House v. Mayo*, 324 U.S. 42, 48 (1945).

[5]See also *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) (holding that case is "not yet ripe for review" where the court of appeals ruled on several legal issues, but remanded the case to the district court to consider various others).

suggesting that, absent certiorari review, the Second Circuit's interpretation of the ATCA in *Filártiga v. Peña-Irala*, 630 F. 2d 876 (2d Cir. 1988) will "*require* the exercise of the subject-matter jurisdiction over the action on remand." Pet. at 12 n.8 (emphasis added). By reversing the lower court's venue ruling, the Second Circuit remanded this case to the District Court to consider whether to grant petitioners' motion to dismiss the complaint for failure to state a claim for a "tort in violation of the law of nations." (App. A-34.) Should the District Court so find, it would necessarily dismiss the suit for lack of subject matter jurisdiction, because the ATCA permits only federal lawsuits that are founded on such torts. Third and most fundamentally, petitioners ask this Court prematurely to address the *constitutionality* of the Second Circuit's *Filártiga* doctrine. Pet. at 25. Yet this Court does not sit to police all constitutional issues in all cases, without regard to whether they are in fact squarely presented or necessarily decided. It would violate this Court's most fundamental principles to prematurely grant certiorari to review constitutional issues when the lower courts might obviate such review by resolving this case based on fact-specific application of this or other jurisdictional statutes.[6]

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[6]In considering whether subject matter jurisdiction exists on remand, the District Court will consider petitioners' deferred objections that "Plaintiffs Have Not Sufficiently Alleged a Nexus Between a Corporate Entity and the Nigerian Government" and that "Plaintiffs Have Not Alleged Facts Sufficient to Hold These Defendants Responsible For Their Indirect Subsidiary." Defendants' Reply Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint at ii (September 29, 1997). *Cf. Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (dismissing certiorari as improvidently granted after concluding that "deciding this case would require us to resolve a constitutional question that may be entirely hypothetical"); *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (holding that the Court normally "will not decide a constitutional question if there is some other ground upon which to dispose of the case"); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1945) ("If there is one

II. THE COURT OF APPEALS PROPERLY APPLIED THE *FORUM NON CONVENIENS* BALANCING TEST MANDATED BY *PIPER AIRCRAFT CO. V. REYNO* AND *GULF OIL CORP. V. GILBERT.*

Petitioners' first two questions seek review based on an entirely unremarkable weighing of factors enumerated in this Court's two leading *forum non conveniens* decisions, *Piper* and *Gilbert*. Even if plainly incorrect, such fact-dependent balancing would not warrant this Court's certiorari review. Here, the Second Circuit's analysis not only correctly applies this Court's own decisions in *Piper* and *Gilbert*, but is also fully consistent with decisions of other circuits.

Petitioners claim that the Second Circuit rendered the doctrine of *forum non conveniens* a "virtual nullity." Pet. at 14. In fact, the Court of Appeals engaged in precisely the kind of straightforward multifactor balancing that *Piper* and *Gilbert* mandate. Applying the *Piper/Gilbert* test, the Second Circuit explicitly recognized that *forum non conveniens* analysis involves a two-step inquiry into: (1) whether there is an adequate alternative forum, and (2) assuming one exists, whether a balance of the *Gilbert* private and public interest factors tipped for or against dismissing the case to that alternative forum. (App. A-18.) In conducting that inquiry, the Second Circuit appropriately gave weight to the forum chosen by respondents and the interests of the U.S., expressed in the ATCA, as factors weighing in favor of retaining U.S. jurisdiction. The Second Circuit carefully did not hold that foreigners resident in the United States may *always* defeat *forum non conveniens*

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doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

motions.[7] (App. A-24.) Instead, the panel directed that "the district court should consider whether, in view of the plaintiff's U.S. residence, such a dismissal would cause plaintiff significant hardship," a determination that it found cut in respondents' favor. (App. A-24.)[8]

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[7]Instead of mandating "a rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens*," the Second Circuit cited this Court's holding that "the plaintiff's choice of forum should rarely be disturbed," *Gilbert*, 330 U.S. at 508, (App. A-21), to hold that a "plaintiff's lawful U.S. residence *can* be a meaningful factor supporting the plaintiff's choice of a U.S. forum" as his or her home forum (App. A-22) (emphasis added). The panel recognized that *forum non conveniens* dismissal should not turn on a mechanistic evaluation of plaintiff's residence or citizenship, but rather, on a relative balancing of conveniences, with special focus on the hardship the plaintiff would face if the suit were sent to a foreign forum. *Cf. Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 524 (1947) ("In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown."). Here, respondents demonstrated the clear convenience of suing in New York, and petitioners failed to demonstrate the inconvenience of defending there.

[8]As proof that the panel's decision is "outside the mainstream of *forum non conveniens* law," Pet. at 19, petitioners cite its alleged inconsistency with Judge Cabranes' dissent in *DiRienzo v. Philips Servs. Corp.*, 223 F.3d 49 (2d Cir. 2000). Yet even if true, this would hardly make it a matter for this Court to correct, as opposed to the Second Circuit via rehearing *en banc*, a step that no Second Circuit judge (including Judge Cabranes) saw fit to request. In *DiRienzo*, Judge Cabranes explicitly recognized that the Second Circuit's decision here did not set forth a rigid rule favoring rentention of cases when at least one plaintiff is a foreign resident. *See DiRienzo*, 223 F.3d at 77 (Cabranes, J., dissenting) ("Although in *Wiwa* we held that the district court erred in failing to count in favor of the plaintiffs' choice of forum that "two of them were residents of the United States," we also stated clearly that *the key question underlying the relevance of that factor is whether a dismissal for forum non conveniens "would cause plaintiff significant hardship.*") (citation omitted; emphasis adde).

Petitioners claim this ruling conflicts with the Ninth Circuit's decision in *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088 (9th Cir. 1998). Yet on examination, there is no meaningful difference between the *forum non conveniens* principles applied in the two cases, which, under *Piper/Gilbert* balancing analysis, simply reached different outcomes based on their different fact patterns.[9] Nor is there any basis for petitioners' charge that the Second Circuit "conflated" the *Piper/Gilbert* analysis (App. A-20) by issuing a blanket rule rejecting application of *forum non conveniens* to cases arising under the ATCA.[10] Far from giving the statutory cause of action dispositive weight, the Second Circuit properly held that, when analyzing the "public interest" factors set forth in *Gilbert*, the

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[9]*Gemini* involved a U.S. corporate plaintiff, suing in a U.S. forum that was not its home state, against defendants who demonstrated that the incident from which the claim arose occurred in the alternative forum. Plaintiffs neither relied on the ATCA nor demonstrated serious hardship or inconvenience from litigating where the incident occurred. Here, by contrast, the forum where the incident arose (Nigeria) is both unavailable and inadequate. U.S. resident plaintiffs who have been provided specifically with a U.S. forum under the ATCA are suing defendants who have failed to demonstrate substantial interests favoring their preferred alternative forum, Great Britain. (App. A-31 to A-32.) Significantly, the Second Circuit did not decide whether a British forum would in fact be adequate to try this human rights case. (App. A-20.) Instead, the Court assumed *arguendo* the adequacy of the British forum, but determined that *Gilbert's* public and private interest factors weighed more strongly in favor of retention. (App. A-20 to A-21.)

[10]In *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 500 (9th Cir. 1992), which petitioners falsely treat as a conflicting Ninth Circuit decision, Pet. at 15, the court clearly noted that doctrine of *forum non conveniens* is fully available in ATCA cases. *Id.* at 500. The Second Circuit similarly recognized the availability of dismissal here, but concluded that, under the facts of this case, petitioners had failed to establish that the *Gilbert* private and public factors balanced in favor of dismissal.

U.S. interest (expressed in the ATCA) in providing aliens with a federal forum for the adjudication of tort claims in violation of international law is but one of many factors weighing in favor of retention of jurisdiction. (App. A-26 to A-34.)

In a serious misrepresentation, petitioners allege that the Second Circuit "concluded that the policy expressed in the TVPA and the United States residence of two of the plaintiffs outweighed the considerations favoring trial in England." Pet. at 12. In fact, the Second Circuit explicitly stated that these two factors are *not* dispositive.[11] Although petitioners disingenously claim that the Second Circuit denied *forum non conveniens* dismissal "because of a special policy favoring receptivity of such claims" embodied in the Torture Victim Protection Act, Pet. at (i), the Second Circuit made clear that "[t]he other considerations favoring retention of jurisdiction sufficiently outweigh the defendants' claim for dismissal that *we would reach the same result without consideration of the policy interest we have found to be expressed by the TVPA.*" (App. A-34 n.14; emphasis added.) *See also* App. A-30 ("This is not to suggest that the TVPA has nullified, or even significantly diminished, the doctrine of forum non conveniens.").

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[11] "The issue of *forum non conveniens* is *not settled by adding to the mix the considerations favoring retention arising from the U.S. residence of two of the plaintiffs and the policy expressed in the TVPA favoring adjudication of claims of torture in violation of international law.* If the defendants advanced substantial interests supporting dismissal in favor of a British forum we would either remand to the district court for reconsideration or . . . sustain the dismissal notwithstanding our identification of interests in favor of retention that the district court did not consider. *In our view, however, the defendants have offered only minimal considerations in support of an English forum.*" (App. A-31 to A-32; emphasis added.)

In sum, the Second Circuit issued no novel or problematic ruling regarding *forum non conveniens*. It merely applied the *Piper/Gilbert* factors and found that the balancing favored respondents' chosen forum. Petitioners' first two Questions Presented raise no issues of compelling national importance demanding this Court's review, only ones upon which petitioners failed to carry their factual burden before the lower courts. This Court should not now review a fact-specific venue motion simply because petitioners failed to do their job below.

III. A FEDERAL DISTRICT COURT MAY EXERCISE PERSONAL JURISDICTION OVER A CORPORATION THAT MAINTAINS A SUBSTANTIAL AND CONTINUOUS CORPORATE PRESENCE IN NEW YORK.

Contrary to the petitioners' contention, the Second Circuit opinion does not expand the jurisdictional reach of New York federal courts, nor does it conflict with rulings of other circuits. Instead, the Second Circuit engaged in a routine application of established personal jurisdiction law to specific facts. As petitioners note, whether a defendant's activity supports the exercise of personal jurisdiction consistent with due process "depend[s] . . . upon the *quality and nature* of the activity" of the defendants. Pet. at 22 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (emphasis added by petitioners)). Here, the Second Circuit carefully examined the quality and nature of the defendants' activities as set forth in the record and – based on that fact-specific examination – found the exercise of personal jurisdiction comfortably within both statutory and constitutional limits.

Petitioners hyperbolically claim that "the Second Circuit invented a new standard for obtaining general personal

jurisdiction over multinational corporations that do not conduct, or even solicit, business in the United States," based largely on their listing with the New York Stock Exchange ("NYSE"). Pet. at 21. In fact, the appellate court simply applied settled case law to the factual record before it and upheld jurisdiction because the petitioners voluntarily engaged in continuous and systematic activities in New York that extend far beyond those associated with listing their shares on the NYSE.[12] The Second Circuit did not rely on petitioners' NYSE-related activities, but rather on their maintenance of a constant presence in New York, the aim of which is to promote and develop petitioners' relations with the American investor community. Petitioners maintain an Investor Relations Office in New York City, administered by James Grapsi, their "Manager of Investor Relations," who devotes all of his time to the provision of investor relations services on behalf of petitioners. The office is wholly devoted to facilitating the relations of the parent holding companies, the defendants Royal Dutch and Shell Transport, with the investment community, and all office expenses are paid by petitioners, amounting to a significant $500,000 per year

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[12] Cases such as *Sunrise Lumber Co. v. Homer D. Biery Lumber Co.*, 185 N.Y.S. 711 (App. Div. 1921), *cited in* Pet. at 22, are readily distinguishable on their facts. As the Second Circuit correctly noted, cases holding that activities connected with NYSE listings – including the preparation of filings for the Securities and Exchange Commission (SEC) and the employment of transfer agents and depositories for their shares – are not sufficient to support the exercise of personal jurisdiction, do not require that such contacts be disregarded when conducting a jurisdictional analysis. (App. A-13.) Neither should they dictate the result in this case, where the record includes a broad range of contacts *in addition to* those incidental to the petitioners' NYSE listing.

commitment.[13] (App. A-6.) These contacts are hardly accidental, but rather, purposeful and volitional. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Their entire purpose is to promote petitioners' good relationships with existing or potential U.S. investors and to ensure ready access to U.S. capital markets, for which petitioners are willing to spend half a million dollars a year.

This accumulation of contacts led the Second Circuit to the unremarkable conclusion that petitioners maintained "a substantial 'physical corporate presence' in the State, permanently dedicated to promoting the petitioners' interests"[14] (App. A-16) and sufficient to support personal jurisdiction. Under long-established New York law, a foreign corporation is subject to general personal jurisdiction if it is "doing business"

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[13]The Investor Relations Office fields inquiries from investors and potential investors throughout the United States, mails information about petitioners to thousands of individuals and entities throughout the United States, and arranges meetings between company officials, potential investors, and financial analysts throughout the United States. (App. A-6.) Grapsi characteristically seeks the petitioners' approval before scheduling meetings and making other similar decisions. (App. A-6.) Moreover, petitioners hold accounts in New York banks, retain New York counsel, and have participated in at least one lawsuit in New York as defendants, without contesting jurisdiction.

[14]The string of cases cited by petitioners holding that solicitation of orders or promotion of products are inadequate to support general jurisdiction, *see* Pet. at 22-23, all involved isolated or occasional activity, not the kind of undeniable continuous presence at issue here. For similar reasons, the Second Circuit's opinion does not conflict with this Court's opinion in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), which held an exercise of general jurisdiction unconstitutional because the record showed only isolated purchases of equipment, not the kind of continuous, systematic, and permanent in-forum business activity conducted by petitioners.

in the state. *See* N.Y. C.P.L.R. § 301.[15] The Second Circuit's settled interpretation of New York procedural law is hardly worthy of this Court's *de novo* review.[16]

Petitioners grossly distort the opinion below when they assert that it justifies general jurisdiction solely because a corporation is listed on a stock exchange and performs acts in the forum designed to cultivate investor relations. Pet. at 21. No such general statement can be found in the Second Circuit's opinion, nor can such a blanket rule be inferred from it. To the contrary, it is petitioners who promote adoption of a bright-line rule: that the promotion and solicitation of sale of securities can

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[15]An extensive line of state and federal cases has given definition to New York's "doing business" requirement, in both its statutory and constitutional dimensions. Under this body of law, the activities of the defendant cannot be occasional or casual; instead, the plaintiff must show that the defendant has engaged in "continuous, permanent and substantial" activity in New York. *See, e.g., Landoil Resources Corp. v. Alexander & Alexander Services, Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1991). The Second Circuit correctly determined that the exercise of general personal jurisdiction was proper because petitioners' activities in this case rose to that level.

[16]Although petitioners claim that "[a]ssertion of jurisdiction over petitioners also violates the fairness requirement of the Due Process Clause," Pet. at 21 n.14, petitioners' forum contacts match or exceed those of defendants in this Court's due process cases upholding the exercise of general personal jurisdiction. *Cf. Argentina v. Weltover*, 504 U.S. 607, 617-20 (1992) (Scalia, J.) (finding no due process violation in holding that personal jurisdiction existed over Argentina based on such contacts as issuance of negotiable dollar-denominated debt instruments payable in New York and appointment of financial agent in that city), *aff'g* 941 F.2d 145 (2d Cir. 1991); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952) (upholding personal jurisdiction where president of defendant corporation maintained office in forum state from which he kept files, carried on correspondence, held occasional meetings, paid salaries, and maintained in-state bank accounts).

never form the basis for general jurisdiction, no matter what the extent, quality, or nature of the contacts associated with that activity. Moreover, although respondents argued below that petitioners' subsidiaries should be viewed as their agents for purposes of assessing jurisdictional contacts, the Second Circuit narrowly rested personal jurisdiction "over the defendants on the basis of the activities of the Investor Relations Office" (App. A-9 n.4), and thus, did "not reach any of the other jurisdictional issues raised by" respondents. (App. A-9 n.4.) As with petitioners' Question Four, *see* Part I, *supra,* it would be pointless and premature for this Court now to review whether the Investor Relations Office provided sufficient contacts to sustain personal jurisdiction over petitioner when petitioners' huge subsidiaries maintain far more extensive contacts with New York that would amply support exercise of personal jurisdiction on remand.[17]

In sum, the personal jurisdiction issue is entirely uncertworthy. Petitioners ask this Court to engage in both an unwarranted re-evaluation of New York civil procedure law and an unprecedented departure from the settled method applied by

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[17]Petitioners own huge subsidiary companies that do extensive business in the United States. These include Shell Petroleum, Inc. (SPI), a Delaware corporation, which owns all the shares of Shell Oil Company (Shell Oil), the well-known oil and gas concern, which obviously has extensive operations in New York. Although the Court of Appeals ultimately based personal jurisdiction on the activities of the Investor Relations Office, it also found that petitioners' contacts with New York apparently satisfied both the "solicitation plus" standard for minimum contacts and the fairness criteria found in Justice O'Connor's opinion in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (O'Connor, J.) *See* App. A-14 to A-17. Were this Court now to grant and reverse on this issue, those holdings would provide an alternative basis for sustaining the Second Circuit's personal jurisdiction ruling on remand, again obviating the need for this Court's review.

the courts in more than five decades since *International Shoe*. This Court ought not waste its resources reviewing a correct, fact-specific application of settled state procedural law, which creates no circuit split, and is fully supported by jurisdictional facts in the record.

IV. A FEDERAL DISTRICT COURT MAY EXERCISE ORIGINAL JURISDICTION UNDER THE ALIEN TORT CLAIMS ACT OVER A SUIT BY ALIENS, FOR TORTS ONLY, COMMITTED IN VIOLATION OF THE LAW OF NATIONS.

Finally, petitioners urge this Court to grant certiorari to consider an issue never briefed nor argued until their petition for rehearing *en banc*: namely, whether the line of lower court decisions beginning with the Second Circuit's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), should be reversed as an "unwarranted expansion of the power and obligation of the federal courts." Pet. at 13. Even if this issue were not entirely premature, *see* Part I, *supra*, this Court need not grant certiorari to "secure uniformity of decision," SUP. CT. R. 10, for the simple reason that no circuit split exists on the jurisdictional question raised by the petition. In 1980, in *Filártiga*, the Second Circuit unanimously held that the ATCA affords federal jurisdiction where aliens sue for tortious injuries committed in violation of customary international law. As this Court "has stated time and time again . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Following the ATCA's precise words, *Filártiga* ruled that the ATCA means just what it says: when an alien brings a suit for torts in violation of the law of nations, the federal court may properly assert jurisdiction under 28 U.S.C. § 1350.

Since 1980, federal courts in seven circuits have consistently reaffirmed *Filártiga* and its underlying principles.[18] Contrary to petitioners' claim, there is no split between these rulings and the D.C. Circuit's fractured decision in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). In *Tel-Oren*, a sharply splintered panel (Edwards, Bork & Robb, JJ.) divided three ways in refusing to *extend* the *Filártiga* holding to a claim of terrorism against the Palestine Liberation Organization, but nowhere stated a holding conflicting with *Filártiga*.[19] In the seventeen

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[18]*Filártiga* has been followed by circuit and/or district courts in the First Circuit, *see, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 178-83 (D. Mass. 1995), the Second Circuit, *see, e.g., Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); the Third Circuit, *see, e.g., Iwanowa v. Ford Motor Company*, 67 F. Supp.2d 424, 438-41 (D.N.J. 1999); *Jama v. U.S. Immigration and Naturalization Service*, 22 F. Supp.2d 353, 362-64 (D.N.J. 1998); the Fifth Circuit, *see, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999); the Ninth Circuit, *see, e.g., Alvarez-Machain v. United States*, 96 F.3d 1246 (9th Cir. 1996), *amended by* 107 F.3d 696, 702-703 (1997), *cert. denied*, 522 U.S. 814 (1997); *In re Estate of Marcos*, 25 F.3d 1467, 1472-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 498-503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); the Eleventh Circuit, *see, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996); and the D.C. Circuit, *see, e.g., Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 7-8 (D.D.C. 1998).

[19]As Judge Bork noted, the division within *Tel-Oren's* panel made "it . . . impossible to say even what the law of this circuit is" regarding the scope of the ATCA. *Tel-Oren*, 726 F.2d at 823 (Bork, J., concurring). Petitioners cite Judge Edwards' *Tel-Oren*, concurrence to suggest that this matter demands Supreme Court review, Pet. at 29, yet fail to note that in every case in which this issue has been raised, including *Tel-Oren* itself, this Court has not seen fit to grant review. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003

years since *Tel-Oren*, not one court has found its contradictory opinions to be persuasive authority, much less to create a conflict demanding certiorari review.[20]

Citing isolated law review articles, petitioners broadly challenge the constitutionality of federal court subject matter jurisdiction over torts in violation of the law of nations, a practice that has prevailed in the federal courts for more than 210 years. Yet again, petitioners ignore a central fact: that federal jurisdiction in this case rests not on unanchored federal common law, but on the ATCA, a federal statute.[21] Whether or not the

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(1985); cases cited in note 18, *supra*. In urging this Court to deny certiorari in *Tel-Oren*, then-Solicitor General Rex Lee argued:

> Neither the court of appeals' judgment order nor the reasoning set forth in the lengthy concurring opinions of the participating judges creates any clear conflict in the circuits. The only proposition for which the judgment below may fairly be read – that in the circumstances of this case, petitioners have not alleged facts sufficient to support the district court's exercise of subject matter jurisdiction . . . does not conflict with the Second Circuit's decision in *Filártiga*.

U.S. Brief as *Amicus Curiae*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), 24 I.L.M. 427, 431 (1985).

[20]Judges Edwards and Bork took pains to point out that their reading of the ATCA would not conflict with the decision of any other circuit, including the Second Circuit's decision in *Filártiga*. *See Tel-Oren*, 726 F.2d at 790-91 (Edwards, J); *id.* at 819-20 (Bork, J.) *See also Doe v. Islamic Salvation Front (FIS)*, 993 F.Supp. 3 (D.D.C. 1998) (district court decision following *Filártiga*, on the ground that *Tel-Oren* announced no D. C. Circuit rule).

[21]Thus, none of the Supreme Court cases cited by petitioners, Pet. at 25-26, are relevant to petitioners' constitutional claim, because none concern federal common law created under federal statutes. Most of these cases actually support the principle that federal courts have jurisdiction over questions of international law. *See Ker v. Illinois*, 119 U.S. 436, 444 (1886) ("a question of . . . the law of nations [is one] of which that court is bound

federal courts have "independent" constitutional authority to assert subject matter jurisdiction over claimed violations of international law (the issue raised by petitioners, Pet. at 24), there can be no doubt that *Congress* – which has power under Art. I, sec. 8, cl. 10 of the Constitution to define and punish offenses against the law of nations – has the power to authorize federal subject matter jurisdiction over torts in violation of international law. The first Congress enacted the ATCA as part of the First Judiciary Act of 1789, recognizing that a tortfeasor who commits torts in violation of the law of nations could be sued wherever he might be found. Because such cases tend to raise questions of international and foreign affairs law, the ATCA encourages the resolution of such suits in federal, not state, court. *See generally* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1 & 2), 101 U. PA. L. REV. 26, 792 (1952). This Court has accordingly described the ATCA as one of several statutes "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S.

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to take notice, *as it is of the courts of the United States*") (emphasis added); *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) (questions of international law "must be determined in the first instance by the court, state *or national*, in which the suit is brought," and when such questions are brought in federal courts, the federal court "must decide for itself, uncontrolled by local decisions") (emphasis added); *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 443 (1924) (customary international law is "applicable as fully to suits in the state courts *as to those prosecuted in the courts of the United States*") (emphasis added). In *New York Life Insurance Co. v. Hendren*, 92 U.S. 286 (1875), this Court declined to re-examine a state court decision regarding the effect of the Civil War upon a life insurance contract, but in no sense concluded that "uncodified international law does not present a federal question or arise under the laws of the United States." Pet. at 25.

398, 427 n.25 (1964). No one disputes Congress' constitutional power to create a cause of action for violations of international law and to assign jurisdiction over such claims to the federal courts.[22] Because the ATCA creates a cause of action for torts in violation of international law, federal jurisdiction is proper over such claims because they raise federal questions "arising under" federal law, 28 U.S.C. § 1331.[23]

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[22]To the contrary, every court that has decided a case based on the ATCA has so held. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d at 848 (ATCA properly confers federal jurisdiction "while delegating to the courts the task of fashioning remedies") (citing *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448 (1957)); *In re Estate of Marcos*, 25 F.3d at 1472-74; *Filártiga*, 630 F.2d at 885-87 (Congress properly granted federal courts jurisdiction over claims arising under international law, which is part of federal common law); *Eastman Kodak Company v. Kavlin*, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997) (ATCA is properly based upon Congress' Article I, § 8, cl. 10 power to "define and punish . . . offenses against the Law of Nations").

[23]Petitioners acknowledge Congress' power to create federal claims for violations of international law. Pet. at 25. Even Professors Bradley and Goldsmith, upon whom petitioners rely for their core argument denying that customary international law is federal law, recognize that ATCA is constitutional if interpreted as creating a cause of action for violations of international law or as delegating to the federal courts the task of defining such a cause of action. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 872-73 (1997). Petitioners ignore sources dating back over 200 years, to shortly after ATCA was enacted, which make clear that the ATCA provides not only a basis of jurisdiction, but also a civil remedy. *See, e.g.*, 1 OP. ATT'Y GEN. 57, 59 (1795) (ATCA grants civil remedy to aliens injured by plundering of British colony in violation of law of nations); 26 OP. ATT'Y GEN. 250, 253 (1907) (ATCA "provide[s] a forum and a right of action" if acts violate the law of nations). In enacting the TVPA in 1991, "Congress endorsed the *Filártiga* line of cases" and "recognized that the Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international

Petitioners wrongly claim that *Filártiga*'s reliance on international law as federal common law conflicts with this Court's holdings dating from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In *Erie*, this Court rejected the old "general federal common law," but on the same day acknowledged certain areas of distinctly federal concern, including foreign relations, in which a true federal common law remains appropriate.[24] Since then, this Court has held repeatedly that federal common law is a proper basis of federal court subject matter jurisdiction in foreign relations cases.[25] *Filártiga*'s

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law." *Abebe-Jira*, 72 F.3d at 848; *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (noting that "[t]he TVPA codifies the holding in *Filártiga* ").

[24]*See, e.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (Brandeis, J.) (opinion by *Erie*'s author reaffirming, on the same day that *Erie* was decided, existence of zones of specialized federal common law upon which state law cannot be conclusive). *See also* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1830-41 (1998) (discussing *Erie* and federal common law of international relations).

[25]*See, e.g., First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (ruling based on federal common law, which is "necessarily informed by international law principles"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (although there is "no federal general common law," federal courts have authority to formulate "federal common law" in a few "narrow areas," including "international disputes implicating . . . our relations with foreign nations"); *Sabbatino*, 376 U.S. at 426-27 ("enclaves of federal judge-made law . . . bind the States" where "necessary to protect uniquely federal interests," including rules governing "matters of international significance"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972). Petitioners nowhere address the logical outgrowth of their argument: that if customary international law is not federal law, it must be state law, whose potential misapplication by state courts would be wholly immune from this Court's

holding that international law is governed by federal common law thus fits comfortably within this well-settled Supreme Court doctrine.

In sum, *Filártiga*'s application of the ATCA has been held constitutional by every federal court that has considered the question. Although petitioners' novel theory of customary international law has been urged by a few commentators, that theory has not been adopted by a single court, conflicts with the considered view of the American Law Institute's *Restatement (Third) of Foreign Relations Law,*[26] and has been resoundingly rebutted by a long list of experts not cited by petitioners.[27] Finally, as Chief Judge Walker has noted, petitioners cry wolf when they claim that the ATCA has somehow opened the

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certiorari examination. *See* Koh, *supra* note 24, at 1829 (this "theory would allow Massachusetts to deny the customary international law protection of head-of-state immunity to Queen Elizabeth on tort claims arising out of events in Northern Ireland, whereas the forty-nine other states could choose instead to grant the Queen every conceivable variant of full or partial immunity").

[26]RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, at 45 (1986) ("Customary international law, like other federal law, is part of the 'laws . . . of the United States'").

[27]*See, e.g.*, Koh, *supra* note 24; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 428 (1997); Derek Jinks & Ryan Goodman, Filártiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

floodgates of litigation.[28] Inasmuch as the courts hearing such cases are only following the instructions of Congress, Congress has shown no inclination to restrict the ATCA's application.[29] Nor should this Court exercise its certiorari jurisdiction to resolve intellectual differences among academic commentators in a case that so manifestly fails the standards set forth in Supreme Court Rule 10.

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[28]As Chief Judge Walker of the Second Circuit has noted:

> It is safe to say that, quantitatively, international human rights law is not a major, or even a minor, component of the business of federal courts: it is a minuscule part of what we do . . . . The fact that Congress has not [amended or repealed the ATCA], and indeed, appears to have endorsed the *Filártiga* approach in the legislative history of the Torture Victim Protection Act, indicates that the substantial concerns that have been voiced are, at least to this point, largely theoretical.

Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U.L.J. 539, 560 (1997). Moreover, the federal courts are fully capable of dismissing ATCA cases when they conclude that they do not meet the exacting standards of the statute. *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161; (5th Cir. 1999) *Bigio v. Coca Cola Co.*, – F.3d –, 2000 WL 331522060 (2nd Cir. 2000); *Wong-Opasi v. Tennessee State University*, 229 F.3d 1155 (6th Cir. 2000); *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (all granting motions to dismiss).

[29]To the contrary, Congress has twice legislated in this area over the past decade, and both times has left the ATCA intact, in the process expanding, not restricting, the categories of international human rights claims cognizable in federal court. *See* TVPA (1991) (extending claims for torture and extrajudicial execution to U.S. citizens as well as aliens); and the "terrorist state" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000) (creating exception to sovereign immunity for lawsuits alleging specified human rights violations against certain States).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM CO., ET AL.,
Petitioners,

v.

KEN WIWA, ET AL.,
Respondents.

On Petition for Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CONGRESSMAN CHRISTOPHER H. SMITH, CONGRESSWOMAN ILEANA ROS-LEHTINEN, THE ANTI-DEFAMATION LEAGUE, THE CUBAN AMERICAN NATIONAL FOUNDATION, AND THE FOUNDATION FOR HUMAN RIGHTS IN CUBA IN SUPPORT OF RESPONDENTS KEN WIWA, ET AL.

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INTEREST OF *AMICI CURIAE*

Congressman Christopher H. Smith, Congresswoman Ileana Ros-Lehtinen, the Anti-Defamation League, the Cuban American National Foundation, and the Foundation for Human Rights in Cuba submit this brief *amici curiae* in support of Respondents Ken Wiwa, *et al.*[1]

Congressman Christopher H. Smith (Republican) represents New Jersey's Fourth Congressional District. Congressman Smith currently serves as the Chairman of the House Committee on Veterans' Affairs, the Vice Chairman of the House Committee on International Relations, and the Co-Chairman of the Congressional Commission on Security and Cooperation in Europe. Congressman Smith supported the passage of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (*reprinted in* 28 U.S.C. § 1350) (the "TVPA"), and believes that both the TVPA and the Alien Tort Claims Act, 28 U.S.C. § 1350 (the "ATCA"), are constitutional and consistent with U.S. foreign policy goals, including the eradication of serious human rights violations.

Congresswoman Ileana Ros-Lehtinen (Republican) represents Florida's Eighteenth Congressional District. A political refugee from Cuba's Communist regime, Congresswoman Ros-Lehtinen is committed to the defense of human rights, religious freedoms, and the

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[1] Letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Counsel for the parties did not author this brief in whole or in part. No person or entity, other than the *amici* named above, their members or their counsel, made a monetary contribution to the preparation and submission of this brief.

promotion of democracy, supporting legislative initiatives which further these goals throughout the world. Congresswoman Ros-Lehtinen currently serves as Chairman of the House Subcommittee on International Operations and Human Rights and as Vice-Chairman of the Subcommittee on Western Hemisphere of the House Committee on International Relations. From 1995-1997, she served as Chairman of the Subcommittee on Africa during which time she condemned the execution of Ken Saro Wiwa and other human rights violations in Nigeria. She supported the passage of the TVPA and believes that both the TVPA and the ATCA are constitutional and consistent with U.S. foreign policy goals.

The Anti-Defamation League (the "ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all citizens alike. It has long been ADL's mission to combat all types of prejudice, discriminatory treatment and hate. ADL has devoted its energies and its resources to securing and safeguarding human rights for all minorities, and has spoken out consistently against abuses of fundamental rights in the United States and overseas. This case is of particular importance to the ADL because it could impact the ability of aliens who are victims of religious, racial or ethnicity-based persecution to bring claims in U.S. courts alleging violations of the ATCA.

The Cuban American National Foundation (the "CANF") is an independent, non-profit organization dedicated to the re-establishment of freedom and democracy in Cuba. The Foundation for Human Rights in Cuba (the "FHRC") is a private, non-profit organization dedicated to defending the basic human rights of the people of Cuba, truthfully and accurately monitoring human rights violations in Cuba, and promoting and developing a culture of respect for the

dignity of the human being independent of political beliefs. The CANF and the FHRC have a strong interest in this case because of their dedication to the principle of respect for human rights and their concern regarding the repression of and human rights violations suffered by the people of Cuba.

SUMMARY OF ARGUMENT

By way of Question 4 of their petition for writ of certiorari, Petitioners Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, P.L.C., ask this Court to use this case as a vehicle for overturning a different case decided more than twenty years ago, *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which interpreted the ATCA. Unable to point to any true disuniformity in the law, Petitioners suggest a "parade of horribles" -- disastrous foreign policy implications and an "explosion" of litigation -- that they suggest has followed or will follow *Filártiga*. But, as will be demonstrated, Petitioners' rather hysterical predictions are based upon a fundamental misunderstanding of *Filártiga*'s scope. That case, in fact, permits federal court jurisdiction over only a very narrow class of cases, namely, those that allege violations of well-established and accepted international norms of conduct. Courts reviewing ATCA claims that, in their view, are based upon novel or controversial theories of international law, have had no difficulties rejecting jurisdiction over those claims. Indeed, since *Filártiga*, the federal courts have permitted only a small number of cases to proceed under the ATCA, and those cases have alleged only the most serious types of human rights abuses -- officially sanctioned torture, extra-judicial killings and "disappearances," and prolonged aribitrary jailings -- that all civilized nations universally condemn.

Filártiga and its progeny are fully in line with the well-established foreign policy of the United States, which favors the protection of individual rights, and

which obviously denounces the types of serious human rights abuses that are subject to redress under the ATCA. Indeed, Congress approved of *Filártiga*, and codified its specific holding, in the TVPA. Thus, not only has *Filártiga* met with essentially unbroken approval within the courts, but it also has been fully accepted by Congress as a salutory decision that *correctly* interpreted the ATCA. Accordingly, a review of the *Filártiga* decision in the context of this case would neither promote uniformity of the law nor serve any legitimate policy purpose.

For these reasons, *amici* urge the Court to deny the petition for certiorari with respect to Question 4.

ARGUMENT

I. The Jurisdiction Of The Federal Courts Under The ATCA, As Interpreted In *Filártiga*, Is Narrow, Can Only Be Invoked For Redress Of The Most Universally Recognized Violations Of International Law, And Has None Of The Pernicous Effects Attributed To It By Petitioners

Contrary to Petitioners' implicit suggestions, *Filártiga* was not intended, and has not been used, as a tool for litigants to assert novel or untested theories of international law. Rather, the decision itself makes clear that only a narrow class of cases -- those alleging violations of uncontroversial international norms of conduct accepted by all civilized nations -- fall within the jurisdiction conferred by the ATCA. And the decision also makes clear that mere allegations are insufficient to establish ATCA jurisdiction; rather, a court faced with an ATCA claim must make an independent inquiry into the well-recognized sources of international law before concluding that the alleged tortious conduct does, in fact, violate such a well-established norm, and, thus, that the court has jurisdiction. Accordingly, contrary to Petitioners' assertions, *Filártiga* and its progeny represent neither a

vast expansion of federal court jurisdiction, nor a threat to any of this Nation's legitimate foreign policy concerns.

The plaintiffs in *Filártiga*, citizens of Paraguay, alleged that the defendant, at a time when he was a high-ranking police officer in Paraguay, kidnapped and then tortured to death a member of their family as retribution for their political opposition to the ruling government. 630 F.2d at 878.[2] Plaintiffs alleged that this conduct -- causing death through "deliberate torture perpetrated under color of official authority," *id.* at 878 -- constituted the tort of wrongful death, and was "committed in violation of the law of nations" within the meaning of the ATCA, 28 U.S.C. § 1350.

Given the particularly heinous conduct alleged, the court in *Filártiga* might well have concluded, with little analysis, that such "official torture" was indeed a "violation of the law of nations." But the court did not do so, choosing instead to engage in a rigorous and painstaking analysis of the question. The court held that a plaintiff alleging ATCA jurisdiction must demonstrate that he or she is alleging a violation of "'a settled rule of international law'" recognized by "'the general assent of civilized nations.'" 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)). The court recognized that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one," *id.*, and specifically interpreted the ATCA "*not* as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights *already recognized by international law*." *Id.* at 887 (emphasis added). Thus,

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[2] The defendant, some time later, sold his house in Paraguay and entered the United States, where he was served with plaintiffs' complaint, thereby establishing personal jurisdiction. *Id.* at 878-79.

the formulation of ATCA jurisdiction in *Filártiga* is quite narrow, and is limited to claimed violations of norms that are accepted by all civilized nations, including, of course, the United States.

The court in *Filártiga* made clear that federal court jurisdiction under the ATCA is *not* established merely by a plaintiff's *allegations* of a "settled rule" of international law. The court specifically differentiated between the "well pleaded complaint" analysis typical under 28 U.S.C. § 1331 and the analysis necessary under the ATCA, which requires courts to "engage[] in a more searching preliminary review of the merits. . . ." 630 F.2d at 887-88.

Indeed, in the *Filártiga* decision itself, the court demonstrated this type of analysis. In making the jurisdictional determination, the court did not rely upon plaintiffs' allegations concerning the state of international law. Rather, it looked to "the sources from which customary international law is derived," such as "the usage of nations, judicial opinions and the works of jurists. . . ." *Id.* at 884; *see also id.* at 880 ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'") (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).[3] Only upon a painstaking review of these sources (as well as unrebutted affidavits of legal scholars submitted by the plaintiffs), and only upon finding "no dissent" on the issue, *id.* at 882, did the court finally conclude that the tort being alleged -- "deliberate torture perpetrated under color of official

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[3] That method of determing the existence and scope of customary international law is well-established and well-accepted. *See* Restatement (Third) of the Foreign Relations Law of the United States § 103(2) (1986).

authority," *id.* at 878 -- was indeed one "in violation of the law of nations."

Thus, properly understood, *Filártiga* gives federal district courts little discretion to entertain claims based upon novel or controversial theories of international law. Rather, a plaintiff who seeks to rely upon the ATCA must demonstrate to the court's satisfaction that he or she is, indeed, alleging a violation of "the law of nations," a term limited to settled rules to which all civilized nations give their assent.

Indeed, since *Filártiga*, the federal courts have been rigorous in limiting the ATCA's reach to "'well-established, universally recognized norms of international law . . . as opposed to idiosyncractic legal rules.'" *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) quoting *Filártiga*, 630 F.2d at 881, 888. Post-*Filártiga* ATCA jurisprudence has been described as permitting federal court jurisdiction only where: (1) a recognizable, universal norm of prohibition exists; (2) sufficient criteria exist to determine whether a given action amounts to the prohibited act and thus violates the norm; and (3) the prohibition is obligatory. *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997) (citations omitted), *aff'd*, 197 F.3d 161 (5th Cir. 1999); *see also* Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 495 (1997) (noting that juridically cognizable customary international law must be universal, definable, and obligatory). And the courts have remained loyal to that strict and narrow formulation in determining their own jurisdiction under the ATCA. *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166 (5th Cir. 1999) (ATCA "'applies only to shockingly egregious violations of universally recognized principles of international law'") *quoting Zapata v. Quinn*, 707 F.2d 691, 692 (2d. Cir. 1983) (*per curiam*); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3,

7 (D.D.C. 1998) (law of nations is "formed by the 'general assent of civilized nations'") (quoting *Filártiga*, 630 F.2d at 880); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (norms of international law must be "universal, definable and obligatory").

Petitioners' arguments about the allegedly pernicious effects of *Filártiga*, therefore, are substantially overblown, if not entirely baseless. For example, Petitioners argue that *Filártiga* has led to the "opening of the federal courts to a large class of jurisdictionally questionable lawsuits" that will have "foreign policy consequences" including "the risk of reciprocal action against U.S. entities in foreign courts." Pet. at 4. Petitioners, of course, point to no example of such dire "consequences," even though *Filártiga* has been the well-accepted law throughout the Nation for more than twenty years.

This lack of examples is hardly surprising, given that *Filártiga* itself only permits federal court jurisdiction over suits alleging violations of international norms that are *not* controversial and that civilized nations (including, of course, the United States) *readily accept*. While a foreign nation might well object to the assertion of jurisdiction over one of its citizens, that is an issue of *personal* jurisdiction, one that can arise in *any* case against a foreign national, and one that is in no way unique to lawsuits brought under the ATCA. Indeed, because ATCA claims must be based upon alleged violations of norms that, by definition, must be accepted by all civilized nations, claims under the ATCA are actually far *less* likely to cause offense to foreign nations than claims brought under purely domestic laws. Thus, contrary to Petitioners' contention, there is nothing inherent in the ATCA, or in *Filártiga*'s interpretation of that statute, that is likely to have (or that has had) any adverse "foreign policy consequences."

Petitioners also assert that, as a result of *Filártiga*, "[t]he federal courts have already seen an explosion of international law litigation with highly attenuated connections to the United States." Pet. at 4. That too is both undocumented and untrue. Petitioners, as evidence of this "explosion," cite to a total of *six* cases brought in the twenty years since *Filártiga*. And regardless of the number of cases actually *filed* that *allege* ATCA jurisdiction, the federal courts have had little difficulty in limiting the number and types of cases over which they *accept* such jurisdiction. Consistent with the stringent limitations set forth in *Filártiga* itself, courts have found that claims asserting official torture, summary execution, causing the disappearance of persons, and prolonged arbitrary detentions are cognizable under the ATCA, but that claims asserting impairment of free speech, negligence, fraud, price fixing and environmental torts are not.[4] This

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[4] *Compare Kadic v. Karadzic*, 70 F.3d at 241-42 (genocide actionable); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999) (unpaid forced labor actionable): *Islamic Salvation Front*, 993 F. Supp. at 3 (hijacking, summary execution, rape, mutilation, sexual slavery and murder actionable); *Jama v. United States Immigration & Naturalization Serv.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) (cruel, unhuman and degrading treatment actionable); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1094 (S.D. Fla. 1997) (prolonged arbitrary detention in inhumane conditions actionable); *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (official torture and cruel, inhuman and degrading treatment actionable); *and Xuncax*, 886 F. Supp. at 184-87 (torture, summary execution, disappearance, arbitrary detention, and certain cruel, inhuman and degrading treatment actionable); *with Kruman v. Christie's Int'l, PLC*, No. 00Civ.6322 (LAK), 2001 WL 77059, at *5 (S.D.N.Y. Jan. 30, 2001) (price fixing not

[Footnote continued on next page]

demarcation illustrates that courts have acted conservatively and with no hint of illegitimate "activism," in determining whether an alleged offense is within their jurisdiction under the ATCA.[5]

II. The ATCA, As Interpreted By *Filártiga*, Furthers The Strong -- And Congressionally Recognized -- Policy Interests Of The United States In Providing A Forum To Victims Of Universally Condemned Human Rights Violations

Lawsuits enforcing globally recognized norms of human rights promote U.S. policy regarding the protection of the rights of individuals. Judicial decisions denouncing genocide, extrajudicial killings, and "disappearances" bolster, and certainly in no way contradict, U.S. foreign policy. Decisions under the ATCA -- indeed, the very existence of ATCA

[Footnote continued from previous page]

actionable); *Beanal*, 197 F.3d at 167 (environmental torts not actionable); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud, breach of fiduciary duty, or misappropriation of funds not actionable); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670-71 (S.D.N.Y. 1991) (shipping hazardous wastes not actionable); *and Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (free speech violations not actionable).

[5] Furthermore, not surprisingly, courts have shown no reluctance to dispose of ATCA claims on other grounds, where those claims failed as a legal or factual matter. *See, e.g., Beanal*, 197 F.3d at 161 (plaintiffs did not state justiciable violations of the law of nations); *Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (defendants' summary judgment motion granted); *Iwanowa*, 67 F. Supp. 2d at 424 (dismissal on, *inter alia*, statute of limitations grounds).

jurisdiction -- serves the useful function of discouraging "rogue" state actors, or unscrupulous and sadistic dictators, from ignoring international treaties and universally accepted norms of international law. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397-98 (1991). By permitting appropriate lawsuits to proceed under the ATCA, *Filártiga* vindicates the important vision of the United States as a nation at the forefront of efforts both to strengthen the rule of law and to protect universally recognized human rights. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM J. INT'L L. 461, 493 (1989).[6]

That *Filártiga* is in line with, and not the least bit contrary to, well-established U.S. foreign policy has been specifically recognized by Congress. Congress affirmed its support for the ATCA and *Filártiga* by enacting the TVPA as a supplement to, but *not* a replacement of, the ATCA. The TVPA codified the right of an alien to maintain a cause of action in federal court for official "torture" or "extrajudicial killings," 28 U.S.C. § 1350, a right that, as recognized by *Filártiga*,

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[6] The ATCA also promotes salutory social goals on an individual level by creating a mechanism for dispute resolution and furthering the classic tort goals of compensation, deterrence and punishment. In many cases involving human rights violations, merely finding a hospitable forum can be difficult, if not impossible, for the victim. Bringing the lawsuit in the country where the tort occurred may be untenable. If the victim has managed to flee the country, he or she is unlikely to be willing to return to pursue a lawsuit. Thus, by providing a forum in which such lawsuits can be heard, the ATCA serves a commendable humanitarian purpose. *See generally* Koh, *supra*, 100 YALE L.J. at 2397-98.

aliens already possessed under the ATCA.[7] While Congress understood that aliens already had a remedy for such offenses under the ATCA, as stated in the Reports of the Senate and House of Representatives, Congress intended the TVPA to "establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)." H.R. REP. NO. 102-367 (I), at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86; S. REP. NO. 102-249, 1991 WL 258662 (Nov. 26, 1991).

The House and Senate Reports also make clear that Congress did not intend the TVPA to replace the ATCA. Rather, Congress believed that official torture and extrajudicial killings merited "special attention" and, thus, codified those causes of action under the TVPA. The Reports observe, however, that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350." H.R. REP. NO. 102-367 at 4; see also S. REP. NO. 102-249 at 1991 WL 258662; *see also Beanal*, 969 F. Supp. at 380.

Through the enactment of the TVPA, Congress issued an express ratification of *Filártiga* and its progeny, affirmatively sanctioning the incorporation of customary international human rights law into federal common law. While the ATCA focuses on the grant of jurisdiction to the district courts, the TVPA imposes liability under U.S. law on entities which, under color of the law of any foreign nation, subject an alien (or U.S. citizen) to torture or "extra judicial killing." 28 U.S.C. § 1350. The TVPA thus recognized that the law of nations is incorporated into the law of the United States and that a violation of the international law of human

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[7] The TVPA also extends this right to citizens of the United States.

rights is a violation of U.S. domestic law. *See* H.R. REP. NO. 102-367 at 4.

The legislative history of the TVPA further evidences Congress' approval of *Filártiga*. The House and Senate Reports discuss the *Filártiga* decision, noting that it "met with general approval." H.R. REP. NO. 102-367 at 4; *see also* S. REP. NO. 102-249 at 1991 WL 258862. The House and Senate further affirmed Congress' support for the *Filártiga* rationale by expressly rejecting a concern previously raised by Judge Bork in a concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). In that concurring opinion, Judge Bork questioned the existence of a private right of action under the ATCA without express authorization from the legislative branch. *Tel-Oren*, 726 F.2d at 799. In the House and Senate Reports, however, Congress made clear its intention that courts continue to use the ATCA to incorporate international human rights law as part of federal common law in lawsuits involving a broader range of causes of action than those covered by the TVPA. As emphasized in the House Report, Section 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. REP. NO. 102-367 at 4; *see also* S. REP. NO. 102-249 at 1991 WL 258862; *see also* Goodman & Jinks, *supra*, 66 FORDHAM L. REV. at 513-14.[8]

In short, *Filártiga* not only spawned judicial progeny, but also has been specifically considered and approved by Congress. The principles embodied in *Filártiga* -- the recognition of global norms of international law, and the need for redress for victims of

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[8] *See also* H.R. REP. NO. 102-367 at 3, observing that "Section 1350 has other important uses and should not be replaced."

violations of those norms -- are a central and proud aspect of U.S. foreign and domestic policy, and have been since the ATCA was enacted by the First Congress. *Filártiga*'s interpretation of the ATCA has been accepted by every binding decision of every court that has considered the issue, and has been approved by Congress. There is neither disuniformity in the law, nor any legitimate policy reason to consider overturning this uniform precedent. Accordingly, no purpose would be served by granting the petition with respect to Question 4.

CONCLUSION

The Court should deny the petition for writ of certiorari with respect to Question 4.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY and THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, individually and as Executor of the Estate of his deceased father, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICUS CURIAE SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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No. 00-1168

ROYAL DUTCH PETROLEUM COMPANY and THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,
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KEN WIWA, individually and as Executor of the Estate of his deceased father, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICUS CURIAE SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

The United States Council for International Business ("U.S. Council") respectfully submits this brief as amicus curiae supporting the grant of the petition for certiorari to review *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).[1]

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[1] The parties consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. Counsel for a party did not write any part of this brief. No one other than the U.S. Council, its members, and its counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF AMICUS CURIAE

The U.S. Council has a substantial interest in urging the Court to grant review in this case. The U.S. Council is a trade association of approximately 300 global corporations, accounting firms, law firms, and business associations. The objectives of the U.S. Council are to advance the global interests of U.S. businesses at home and abroad by promoting an open system of world trade, finance, and investment. International affiliates of the U.S. Council have official consultative status on behalf of world business at bodies of the United Nations, the Organization for Economic Cooperation and Development, and the World Trade Organization. As the U.S. affiliate of the International Chamber of Commerce, the U.S. Council has a long-standing role and interest in the efficient settlement of international commercial disputes. The U.S. Council's interest in having the Court review the correctness of the decision below arises from these goals of fostering open world trade and developing widely acceptable methods of resolving international legal disputes.

SUMMARY OF ARGUMENT

The Court should review the Second Circuit's decision because it addressed important issues of federal law and reached conclusions that are inconsistent with decisions of this Court and other federal appellate courts. The Second Circuit decided that, in a case based on the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), the United States has a policy interest in providing a forum for the adjudication of international human rights abuses and therefore that other factors in a forum non conveniens ("FNC") analysis must tilt strongly toward litigation in the foreign forum to justify dismissal. The Second Circuit's decision to restrict the use of FNC in cases based on the ATCA, especially when, as here, an adequate alternative

forum has been found to exist, has broad and important implications for U.S. foreign relations, the relationship between U.S. courts and the courts of foreign countries, and international business and commerce. In addition, the Second Circuit's approach is contrary to the stricter analysis other federal courts apply to determine whether specific statutory language sufficiently manifests a congressional intent to reduce or eliminate the use of FNC.

The Second Circuit also held that it possessed general personal jurisdiction over two foreign corporations based on nothing more than a listing on the New York Stock Exchange and a single "agent," employed by a second-tier subsidiary, who conducted limited investor relations activities in New York. This holding exposes thousands of foreign and out-of-state domestic companies and their assets to the exorbitant general jurisdiction of New York courts, aggravates jurisdictional conflicts between the United States and its trading partners, and contradicts the conclusions of other Circuits on the constitutionally permissible reach of general personal jurisdiction over a parent corporation based on the limited activities of an agent in the forum.

Equally important is the combined effect of the Second Circuit's positions on these two issues. Left unreviewed and uncorrected, the law in the Second Circuit would dramatically increase the availability of that jurisdiction as a forum to resolve international law disputes occurring between aliens anywhere in the world when the disputes have no serious connection with the jurisdiction or the United States.

ARGUMENT

The U.S. Council addresses two of the questions presented in the petition for certiorari. They are whether the use of the FNC doctrine should be restricted in ATCA cases in the way the Second Circuit required and whether a

foreign corporation with an agent conducting limited activities in a forum jurisdiction should be subject to general personal jurisdiction as a result of those activities. The Court should review both of these issues because they are important questions of federal law having significant consequences for foreign relations, the international legal system, and business and commerce and because the federal courts of appeals have reached conflicting decisions on the questions.

The Second Circuit decision is particularly worthy of this Court's review because of the combination of the Second Circuit's approach to exercising general jurisdiction based on agency and to restricting the availability of FNC dismissals in international law cases. The decision would make the Second Circuit a world-wide center for litigating international law controversies having no or insufficient connections with the United States or U.S. sovereign interests. This Court has previously expressed concern about limiting the availability of FNC when "none of the parties are American" and "there is absolutely no nexus between the subject matter of the litigation and the United States."[2]

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[2] See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 n.17 (1981).

I. THE COURT SHOULD REVIEW THE SECOND CIRCUIT DECISION BECAUSE DETERMINING THE APPROPRIATE ROLE FOR THE FORUM NON CONVENIENS DOCTRINE IN ALIEN TORT CLAIMS CASES IS AN IMPORTANT ISSUE OF FEDERAL LAW ABOUT WHICH THE COURTS OF APPEALS ARE DIVIDED.

The Second Circuit altered this Court's established FNC analysis by deciding that, in an ATCA case,[3] the United States has a policy interest in providing a forum for the adjudication of international human rights abuses and therefore that other factors in an FNC analysis must tilt strongly toward litigation in the foreign forum to justify dismissal. The Second Circuit's decision to stifle the use of FNC in cases based on the ATCA, especially when, as here, an adequate alternative forum has been found to exist, has broad and important implications for U.S. foreign relations, the relationship between U.S. courts and the courts of foreign countries, and international business and commerce. The decision is also at odds with the way other courts of appeals apply the FNC doctrine.

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[3] Some of the commentary on the ATCA includes: Kenneth C. Randall, "Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute," 18 N.Y.U. J. Int'l L. & Pol. 1 (1985); Anthony D'Amato, "The Alien Tort Statute and the Founding of the Constitution," 82 Am. J. Int'l L. 62 (1988); William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists,'" 19 Hastings Int'l & Comp. L. Rev. 221 (1996); Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction Over International Human Rights Claims: The Alien Torts Act After Filartiga v. Pena-Irala," 22 Harv. Int'l L. J. 53 (1981).

A. The Second Circuit Decision To Cramp the Use of Forum Non Conveniens in Alien Tort Cases Raises Important Questions of Federal Law Having Implications for U.S. Foreign Relations, the International Legal System, and International Commerce.

The Second Circuit's FNC analysis raises an important issue of federal law for several reasons.[4]

First, the number of U.S. cases premised on the ATCA is increasing significantly, and, because the statute applies only to alien plaintiffs alleging a tort in violation of a treaty of the United States or international law, these cases often raise serious questions about whether the litigation should occur in the United States. Since 1989, over 110 reported federal court decisions referred to the ATCA, and many of these reported cases were suits by non-resident aliens against primarily foreign defendants for activities occurring in a foreign country.

A few examples illustrate these points. Each of these cases was brought in federal court with the ATCA as at least one principal basis for the action:

- In December 2000, Nicaraguan workers sued a jeans factory located in Nicaragua, the company's Taiwanese parent, and the company's U.S. subsidiary (its alleged agent) for alleged violations of labor rights and rights of free expression in Nicaragua. The complaint also claims that Nicaraguan government officials worked in

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[4] The Court has not reviewed the proper role and application of the FNC doctrine since *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), nearly 20 years ago. In that time, the doctrine has increased in importance with the rapid increase in the internationalization of business, trade, and tourism. An electronic search of the decisions of the federal courts of appeals and state courts of last resort in 1999, 2000, and 2001 reveals a reference to FNC in 132 cases.

concert with the company to deny the union leaders' human rights.[5]

- In 2000, residents of Papua New Guinea sued Australian and British mining concerns in California alleging environmental and human rights violations in Papua New Guinea.[6]
- In 1996, U.S. and foreign citizens alleging world-wide classes sued several Swiss banks in New York alleging that the conduct of the banks in Switzerland during and after World War II unlawfully benefited from Nazi persecution of certain groups, looting, and slave labor.[7]
- Over the last several years, more than 60 lawsuits were filed asserting claims against German companies arising out of World War II and the National Socialist era. Many of these cases were brought by aliens as purported class actions alleging violations of international law.[8]

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[5] Tercero et al. v. C&Y Sportswear, Inc. et al., No. 00-CV-12715 (C.D. Cal. filed Dec. 5, 2000).

[6] Sarei v. Rio Tinto plc, No. 00-CV-11695 (C.D. Cal. filed Nov. 2, 2000).

[7] See In re Holocaust Victim Assets, Master Dkt. No. CV-96-4849 (E.D.N.Y.).

[8] See, e.g., In re Nazi Era Cases Against German Defendants Litigation, MDL No. 1337, No. CV-98-4104 (D.N.J.); In re Austrian & German Bank Holocaust Litigation, 98 CV 3938 (S.D.N.Y.).

Other recent ATCA cases include: Kruman v. Christie's International PLC, 2001 WL 77059 (S.D.N.Y.) (antitrust action under ATCA and Sherman Act against foreign auction houses for conspiracy to inflate prices at auctions in London); Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (worldwide descendants of Jewish customers of French banks sued institutions for expropriation of assets in France during World War II); Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y.) (Indian citizens brought action for injury from gas leak in India); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161

As the number of ATCA cases grows, a trend that the Second Circuit's decision would surely encourage, identifying the proper role of the FNC doctrine in those cases increases in importance.

Second, the Second Circuit's FNC approach in ATCA cases has potentially serious consequences for the foreign relations of the United States. The defendants in many cases are foreign governments, sitting or former heads of state,[9] or corporations important to foreign economies. Restricting the ability of district courts to dismiss such cases to more convenient and appropriate fora is bound to create and aggravate frictions between the United States and the affected foreign countries.

The Executive Branch confirmed that ATCA cases can threaten U.S. foreign policy interests when it assisted in resolving the U.S. litigation against German corporations

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(5th Cir. 1999) (Indonesian citizen brought action under ATCA and TVPA for alleged human rights abuses in Indonesia); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (Belgian citizen sued German manufacturer and U.S. parent for forced labor in Germany during World War II); Roe v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (former Burmese soldier brought action for work performed on oil pipeline in Burma); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (victims of atrocities in Bosnia suit against the leader of the insurgent Bosnian-Serb forces).

[9] See, e.g., Feng v. Li, No. 00-CV-6446 (S.D.N.Y. filed Aug. 28, 2000) (allegations of abuses by the former head of state of China during the 1989 protests in Tiananmen Square); Tachiona v. Mugabe, No. 00-CV-6666 (S.D.N.Y. filed Sept. 6, 2000) (allegations that the President of Zimbabwe orchestrated and directed a widespread campaign of violence and terror against the people of his own country); Hwang Geum Joo v. Japan, No. 00-CV-2233 (D.D.C. filed Sept. 18, 2000) (class action against the Japanese government alleging rape and abuse by Japanese soldiers during World War II); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (claims based on the ATCA, the TVPA, and other laws against the individual recognized by the United States as then sitting lawful head-of-state).

for conduct during the Nazi era. The U.S. government stated that the "President of the United States has concluded that it would be in the foreign policy interests of the United States for [a German foundation administering a fund] to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II ...."[10]

Another example is a case brought by Peruvian citizens against several corporations alleging harm from smelting and refining operations in Peru. Peru protested the lawsuit, maintained that the litigation implicated some of its most vital interests, and vigorously asserted that the case implicated foreign policy issues. The Fifth Circuit affirmed a dismissal on FNC and international comity grounds.[11]

Third, the proper application of the FNC doctrine and the preservation of its flexibility[12] are essential to maintaining an appropriate relationship among U.S. courts, the courts of foreign countries, and the international legal system. In a decision starkly conflicting with the decision below, Justice (then Chief Judge) Breyer explained the need to avoid restricting the availability of FNC even in cases

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[10] See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 94 Am. J. Int'l L. 677, 685 (2000) (reprinting excerpts of agreements to resolve the disputes).

[11] Torres v. Southern Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997). The claims were based on municipal law and not the ATCA. Other cases use the ATCA for similar types of allegations. See, e.g., Bano v. Union Carbide Corp., 2000 WL 1225789 (S.D.N.Y.) (alleging violations of international environmental rights under the ATCA for injuries from a gas leak in India).

[12] See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981) (the Court's FNC "decisions have repeatedly emphasized the need to retain flexibility").

premised on important federal statutes such as the securities laws:

> The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes. To insist that American courts hear cases where the balance of convenience and the interests of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one country will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy.[13]

The Court should review the Second Circuit decision to ensure that U.S. courts allow other courts to contribute to the development of international law and accord due respect and deference to other courts and nations that could have significant interests in litigating ATCA cases.[14]

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[13] Howe v. Goldcorp Investments, Ltd., 946 F.2d 944, 950 (1st Cir. 1991).

[14] See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537 (1995) (because a federal statute was modeled on an international convention, U.S. courts should not interpret the statute in a way that would prevent reference to an arbitral tribunal and would "disparage the authority or competence of international forums for dispute resolution"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (U.S. courts should shed "their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.").

Fourth, the Second Circuit's FNC approach in ATCA cases, especially when joined with the exorbitant position on general personal jurisdiction, has potentially serious consequences for international trade and investment. Businesses around the world having only the slightest connection with the United States will be subject to the higher costs of the U.S. legal system and to systematically higher U.S. damage awards for conduct occurring entirely in a foreign country.[15] Both foreign and domestic companies conducting business outside of the United States will face increased burdens and obstacles in transferring litigation to a more appropriate forum. These risks and potentially higher costs could skew or deter trade and investment decisions.

For all these reasons, the Second Circuit's *Wiwa* decision on FNC in ATCA cases is an important issue of federal law that the Court should review. We now explain that, in addition, the reasoning of the court below departs from the FNC analysis other courts of appeals and this Court apply.

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[15] See Russell J. Weintraub, "The United States as a Magnet Forum and What, if Anything, To Do About It," in International Dispute Resolution: The Regulation of Forum Selection 213, 216 (Jack L. Goldsmith ed., 1997) ("Plaintiffs flock to United States courts for two elementary reasons — higher recoveries and lower barriers to suit.") (footnote omitted); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (listing reasons why the U.S. legal system and courts are attractive to foreign plaintiffs); Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 159 (2d Cir. 1980) (en banc) (potential recovery in the United States was $8 million while the recovery in alternative forum was limited to $570,000).

B. The Second Circuit Decision Is Inconsistent with the Decisions of Other Federal Courts on the Circumstances in Which the Existence of Claims Based on a Federal Statute Prevents a Forum Non Conveniens Dismissal.

Although the FNC doctrine generally works well in many cases, this case presents one of the areas in which courts have reached conflicting results: the circumstances in which the existence of a federal statutory claim prevents dismissal in favor of a foreign forum. The Second Circuit concluded that the ATCA as supplemented by the enactment of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, expresses a policy favoring receptivity by U.S. courts to actions alleging violations of international law and that this policy weighs heavily in an FNC analysis in such actions.[16] As the petition pointed out, this conclusion directly conflicts with the Ninth Circuit's statement that FNC is available in ATCA cases.[17] On a broader level, however, the Second Circuit's approach to FNC issues in federal statutory cases is contrary to the stricter analysis other federal courts apply to determine whether specific statutory language sufficiently manifests a congressional intent to reduce or eliminate the use of FNC.

As mentioned above, the First Circuit's decision in a federal securities case contrasts with the reasoning of the

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[16] As briefs on the merits would discuss in detail, the better view of the intent of Congress is that the TVPA did not supplant the use of FNC in TVPA or ATCA cases. For example, section 2(b) of the TVPA by its terms prefers adjudications outside of the United States. See also 138 Cong. Rec. S2667-04, 2668 (daily ed. Mar. 3, 1992) (statement of Sen. Specter: "Nothing in [the TVPA] is intended to or does affect the doctrine of forum non conveniens, which remains applicable to any lawsuit brought under this act.").

[17] Pet. at 15; In re Estate of Marcos Human Rights Litig., 978 F.2d 493, 500 (9th Cir. 1992).

Second Circuit. In *Howe v. Goldcorp Investments, Ltd.*, the court rejected the argument that "special legal circumstances," that is, a venue provision in the federal securities laws broadening a plaintiff's choice of forum beyond those permitted in the general venue statute, deprived a court from using the FNC doctrine.[18] This reliance on an explicit statutory argument was much stronger than the use of the policy interest the Second Circuit derived in *Wiwa* but nonetheless still was not sufficient to prevent the use of FNC.

Other courts have soundly rejected arguments that a variety of other federal statutory claims are not subject to dismissal on FNC grounds. These federal statutes include the Lanham Act on protection of copyrights and the Racketeer Influenced and Corrupt Organizations Act.[19] Courts invoke FNC in cases based on these statutes even though the United States has a strong policy interest in having U.S. courts apply these critical statutes to ensure their proper application and enforcement. The U.S. policy interest in keeping these cases in U.S. courts is at least as strong as the policy the Second Circuit found reflected in the ATCA and the TVPA.

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[18] 946 F.2d 944, 948-50 (1st Cir. 1991).

[19] See Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764, 768-69 (9th Cir. 1991) (citing other cases); see also Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078 (9th Cir. 1999) (applying FNC to tort claims in a U.S. court pursuant to the Foreign Sovereign Immunities Act but concluding that the claims should not be dismissed), withdrawn pursuant to stipulation of the parties, 2001 WL 28095; Creative Tech., Ltd. v. Aztech Sys. Pte. Ltd., 61 F.3d 696 (9th Cir. 1995) (dismissal of federal copyright claims on FNC grounds in favor of parallel proceeding in Singapore based on Singapore law). A panel of the Second Circuit different from the *Wiwa* panel applied FNC to U.S. antitrust claims. Capital Currency Exchange, N.V. v. National Westminster Bank PLC, 155 F.3d 603 (2d Cir. 1998).

The decisions of this Court and lower courts enforcing arbitration agreements and forum selection clauses in cases based on federal statutes also conflict with the Second Circuit's *Wiwa*-analysis. An example is *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, where the Court considered whether a foreign arbitration clause lessened liability in violation of a provision of the Carriage of Goods by Sea Act. Not unlike an opposition to a motion to dismiss on FNC grounds, the argument in *Sky Reefer* was that the higher costs and inconvenience associated with an arbitration in a foreign country would result in lessened liability. Rather than find that the statutory provision evinced a policy to retain COGSA cases in U.S. courts, the Court examined the international context of the statute and the case and decided to enforce the arbitration clause.[20]

This conflict between the Second Circuit's use of the ATCA to limit FNC dismissals and the willingness of other federal courts to dismiss cases based on important federal statutes in favor of foreign tribunals is another reason the Court should review the Second Circuit's decision.

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[20] 515 U.S. 528, 533-39 (1995). See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (referring U.S. antitrust claims to arbitration); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993) (referring U.S. securities and fraud claims to English courts); Riley v. Kingsley Underwriting Agencies, 969 F.2d 953 (10th Cir. 1992) (referring U.S. and state law securities claims to English court and to arbitration in England).

II. THE COURT SHOULD REVIEW THE SECOND CIRCUIT DECISION BECAUSE EXERCISING GENERAL PERSONAL JURISDICTION BASED ON THE LIMITED ACTIVITIES OF AN AGENT IS AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE ON WHICH THE COURTS OF APPEALS ARE DIVIDED.

The Second Circuit held that the Due Process Clause permitted it to exercise general personal jurisdiction over two foreign corporations that have no operational activities in the forum but that list securities on U.S. exchanges and have an investor relations program operated in New York by one employee of a second-tier U.S. subsidiary. The courts below found the investor relations program and employee to be a general agent of the foreign corporations, even though the budget of the investor relations program was less than .00004 of the company's total net income for 2000.[21] This holding merits the Court's review because it presents an important federal constitutional question concerning general personal jurisdiction based on the conduct of an agent. The holding also differs from the conclusions reached by other courts of appeals.

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[21] The Second Circuit observed that the Royal Dutch-Shell Investor Relations Program has an annual budget of approximately $500,000 per year. (Pet. App. A-6 & 11.) Financial statements filed with the SEC by the Royal Dutch-Shell group showed total net income for the company to be $12.719 billion for the year 2000. http://www.shell.com/investor-en/application/0,5037,30352,00.html (under "4th Quarter and Full Year Reports 2000 Slide Pack"). Thus, the Investor Relations Program constitutes approximately .000039311 of Shell's total annual business.

A. The Second Circuit's Decision on General Personal Jurisdiction Presents an Important Federal Constitutional Issue That has Not Been, But Should Be, Settled by This Court.

This Court has never addressed whether or under what circumstances a foreign corporation with an "agent" conducting limited activities in the forum may be subject to general personal jurisdiction as a result of those activities.[22] Consequently, as we discuss later, lower courts have applied inconsistent standards and reached inconsistent results. Furthermore, this Court has ruled on general jurisdiction over out-of-state corporations only twice in the last 65 years,[23] and it has not ruled on personal jurisdiction in an international case since *Asahi Metal Industry Co. v. Superior Court*, which concerned specific, not general, personal jurisdiction.[24] For this and the following reasons, review by this Court of the Second Circuit's general personal jurisdiction conclusion would be timely and appropriate.

First, the Second Circuit's expansive construction of the Due Process Clause exposes thousands of domestic and foreign businesses to legal actions in New York based on events occurring anywhere in the world. The New York Stock Exchange, the American Stock Exchange, and the

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[22] In 1925, the Court ruled in Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925), that the presence of a subsidiary corporation in a state does not confer personal jurisdiction over a parent. Id. at 337. The Court concluded that courts must acknowledge the formal separation between parent and subsidiary companies and that the degree of control exercised by the parent company has no significance in the absence of any applicable statute. Id.

[23] Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[24] 480 U.S. 102 (1987).

NASDAQ together list over 8,000 companies on their exchanges.[25] Of course, the vast majority of domestic listings on those exchanges are companies not incorporated or based in New York, and over 975 listings and ADRs are non-US companies.[26] As a result of the Second Circuit's decision, the thousands of non-New York companies — domestic or foreign — with a single person in New York conducting limited investor relations or any other limited activity may be sued on a claim arising anywhere in the world in the courts of New York. Those courts could also exercise general jurisdiction based on limited agency activity occurring anywhere in the United States when Federal Rule of Civil Procedure 4(k)(2) applies.

Second, a necessary corollary of the exorbitant personal jurisdiction of the Second Circuit is that all the U.S. assets of any person subject to legal action in New York are at risk. A judgment from a court within the Second Circuit entered against a foreign person could be enforced throughout the United States under 28 U.S.C. § 1963 or the Full Faith and Credit Clause and 28 U.S.C. § 1738.

Third, the threat of U.S. legal actions, judgments, and executions against U.S. assets raises the serious prospect of deterring foreign businesses from investing in the United States and making U.S. markets for securities, goods, and services less attractive. Foreign corporations that believe that their assets are in jeopardy by a judgment based on

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[25] http://www.nyse.com/listed/listed.html (3,025); http://www.amex.com/dynamic/marketactivityamex.htm#share (780); http://www.amex.com/dynamic/marketactivity.stm (4,335); see Declaration of Professor John C. Coffee, Jr. (Pet. App. H) ¶ 13.

[26] http://www.nyse.com/pdfs/forlist010206.pdf (432); http://www.amex.com/about/NonUSAmex.stm (55); http://www.nasdaq.com/about/NonUSoutput_A0.stm (488); see Declaration of Professor John C. Coffee, Jr. (Pet. App. H) ¶ 13.

activity wholly unrelated to the United States will be discouraged from placing their assets here.[27] Some foreign corporations may decide not to list or even to de-list their securities from U.S. exchanges.[28]

Fourth, as with the FNC question, the exercise of general jurisdiction based on the limited activities of an agent raises concerns about the role of U.S. courts in the international judicial system. Foreign governments and scholars have criticized the doctrine of general jurisdiction by agency as exorbitant jurisdiction.[29] The Second Circuit apparently disregarded these objections, but they deserve serious consideration in view of this Court's admonition that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[30]

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[27] Declaration of Professor John C. Coffee, Jr. (Pet. App. H) ¶¶ 6-8.

[28] Id. ¶ 7.

[29] Peter F. Schlosser, Lecture, "Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems," 45 U. Kan. L. Rev. 9, 9 (1996); Joachim Zekoll, "The Role and Status of American Law in the Hague Judgments Convention Project," 61 Alb. L. Rev. 1283, 1294-95 (1998); Catherine Kessedjian, "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters," Preliminary Document No. 7, 80 (1997); Mathias Reimann, Conflict of Laws in Western Europe: A Guide Through the Jungle, 77-78 (1995); Russell J. Weintraub, "Negotiating the Tort Long-Arm Provisions of the Judgments Convention," 61 Alb. L. Rev. 1269, 1277-78 (1998).

[30] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987) (internal quotations and citations omitted).

B. The Second Circuit's Decision To Exercise General Jurisdiction over a Foreign Corporation Based on the Limited Activities of an Agent Conflicts with the Conclusions of Other Circuits.

The final reason the Court should review the decision of the Second Circuit is that the conclusion to permit the exercise of general jurisdiction over a foreign corporation based on the limited activities of an agent conflicts with the results other courts of appeals have reached. Decisions from the Fourth and Eleventh Circuits are examples.

The Fourth Circuit case involved a corporation outside of the forum that employed between 17 and 21 promotional and consumer product representatives in the forum for a period of five years. Thirteen of these representatives were residents of the forum. During that time, the corporation sold between $9 million and $13 million in the forum (two percent of the total sales for the company), and made one percent of its purchases there. In addition, the corporation kept samples and promotional materials in the forum, registered and maintained company cars, and held local, regional, and national meetings there. Notwithstanding the continuous presence of agents and assets in the forum, the court held that the agents' limited activity and the parent's limited assets were insufficient to confer general jurisdiction over the defendant.[31] In contrast, the Second Circuit found general jurisdiction over an indirect foreign parent with fewer sales and purchases, fewer agents, and far more limited activity in the forum.

In *Consolidated Development Corp. v. Sherritt, Inc.*, the Eleventh Circuit held that that it lacked general jurisdiction over a Canadian oil company with a subsidiary

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[31] Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1198-1200 (4th Cir. 1993).

in the United States. The Canadian company had three contacts with the United States: (a) it had issued bonds and debentures in the United States, (b) in connection with these offerings, it had appointed an agent for service of process in the United States, and (c) its U.S. subsidiary marketed its products in the United States.[32] The court held that these collective activities did not provide general jurisdiction over the Canadian company.[33] Neither the district nor the appellate court described the activities of the agent in detail, but the differences between the approaches of the Eleventh and Second Circuits indicate the need for this Court to address the appropriate rule for using an agent's conduct as the basis for general personal jurisdiction.[34]

The importance of the federal question, the conflict between the lower courts, and the combined effect of the Second Circuit's decision on general jurisdiction and FNC justify this Court's review.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for certiorari and review the Second Circuit's decision.

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[32] 216 F.3d 1286, 1292-94 (11th Cir. 2000).

[33] Id. at 1294.

[34] See also Glater v. Eli Lilly & Co., 744 F.2d 213, 216-17 (1st Cir. 1984) (no general jurisdiction over an out-of-state corporation with eight employed sales representatives (three of whom lived in the forum) promoting products in the forum).

Respectfully submitted,

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No. 00-1168

IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY, and THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, individually and as Executor of the Estate of his deceased father, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, individually and as Administratrix of the Estate of her husband, JOHN KPUINEN, and JANE DOE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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March 5, 2001

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16 pp

CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The corporate disclosure statement at page ii of the Petition for Writ of Certiorari dated January 19, 2001 is still accurate.

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INTRODUCTION

The Second Circuit's decision allowing federal courts to adjudicate nonfederal claims between aliens for acts occurring abroad, along with its unduly expansive approach to personal jurisdiction and its cramped view of *forum non conveniens*, converts the federal courts into international claims courts open to all disputes arising out of alleged human rights abuses occurring anywhere in the world. The Second Circuit has endorsed that result even though such disputes "can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches" and "pose special questions concerning the judiciary's proper role". *See Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995). This warrants the Court's attention.

That this is a "human rights" case does not diminish the significance or legitimacy of questions about the proper role of the federal courts. Despite the emotional nature of the allegations made against petitioners, we believe that we have calmly and fairly presented the issues in the Petition as important ones that the Court should address.[1] The fierceness of respondents' Opposition—with its repeated charges of "disingenuous[ness]", "serious misrepresentation", "false[] treat[ment]" and "gross[] distort[ion]" (Opp. at 9, 13, 14, 18)—underscores that they, too, appear to believe the issues are important, perhaps too important to them to risk any scrutiny of what the Second Circuit has done.

Respondents thus seek to avoid review by raising procedural objections; mischaracterizing novel legal rulings as "fact-specific application[s]"of settled law (Opp. at 2); and

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[1] United States opposition to the creation of the International Criminal Court shows that reasonable people can differ on the question of what tribunal should hear "human rights" cases. *See* Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. Times, July 18, 1998, at A3. Indeed, the Petition cited an article analyzing the disjunction between the U.S. refusal to subject its nationals to non-U.S. tribunals and the availability of U.S. courts to hear, under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, claims against non-U.S. citizens. (*See* Pet. at 4.)

abandoning the rationale of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). None of respondents' arguments provides a basis for denying the writ. The Petition arises in a routine procedural posture with a fully developed record. *See* Sec. I. The Petition seeks review, not of factual findings, but of legal rulings that conflict with decisions from other circuit courts. *See* Sec. II. And the exercise of subject-matter jurisdiction over this action, on the theory that *common law* claims for violation of international law arise under federal law, conflicts with long-standing Supreme Court precedent. *See* Sec. III.

I. The Petition is ripe for review.

Respondents' assertion that the Court should not review this case because it is "interlocutory" (Opp. at 1, 4, 8) and "premature" (Opp. at 2, 8) is without merit. This case is not interlocutory in the sense of involving an appeal from a nonfinal order of the district court. *Cf.* 28 U.S.C. § 1292 (authorizing such appeals under certain circumstances). The Petition seeks review of a circuit court's reversal of a district court's entry of a final judgment dismissing a lawsuit. (App. B-11.) Review in such a posture is entirely routine and underlies numerous decisions of this Court.[2]

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[2] Such review is especially appropriate where, as here, the questions involve "jurisdictional" doctrines such as *forum non conveniens*, personal jurisdiction and subject-matter jurisdiction, the benefits of which are lost if not resolved at a preliminary stage. The procedural posture here is identical to key precedents such as *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238 (1981) (reviewing circuit court's reversal of district court's pretrial *forum non conveniens* dismissal), *Gulf Oil v. Gilbert*, 330 U.S. 501, 503 (1947) (same), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107-08 (1987) (reviewing state supreme court's reversal of lower court's pretrial dismissal for lack of personal jurisdiction). *See also Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 125-26 (1974) (per curiam) (reviewing circuit court's reversal of district court's pretrial dismissal for lack of subject-matter jurisdiction). For a recent example, see *Board of Trustees of the University of Alabama v. Garrett*, No. 99-1240, 2001 WL 173556 (U.S. Feb. 21, 2001). Whenever the Court reviews such a case, it is possible that the petitioner would have prevailed on other grounds had the Court not acted. There is nothing remarkable about this fact, which neither counsels against review nor renders a ruling by this Court "advisory" (Opp. at 8).

Notwithstanding respondents' suggestion that the Court wait for "a fuller factual record" (Opp. at 8), the facts necessary for disposition of the issues are now a part of the record. There will be no further discovery on, or reconsideration by the lower courts of, the facts relevant to the rulings on personal jurisdiction and *forum non conveniens*.[3] And Question Four—whether claimed violations of the law of nations give rise to federal-question jurisdiction—is a purely legal one.

Finally, respondents are wrong in arguing that the Petition should be denied because Question Four was "neither raised nor resolved" below. (Opp. at 9.) As explained in the Petition (at 5-6), *Filartiga* compelled (and continues to compel) both the district court and the panel of the Second Circuit to exercise subject-matter jurisdiction.[4] Only this Court and the Second

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[3] Respondents' contention that the Court should stay its hand because they allege other grounds (not reached below) for personal jurisdiction (Opp. at 19) is without merit. It is not the practice of this Court to decline to review an otherwise certworthy issue simply because the lower court's decision might be justifiable on alternative grounds not yet considered below. *See, e.g., L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 41 (1999) (deciding issue on which *certiorari* was granted and remanding for consideration of alternative grounds for affirmance); *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 462 (1999) (same).

[4] Accusing petitioners of "grossly distort[ing] the truth" in noting that *Filartiga* would require the district court to exercise subject-matter jurisdiction over this action on remand, respondents argue that statutory jurisdiction under the ATS might yet be found lacking (on the ground that respondents have not adequately pleaded a tort in violation of the laws of nations), thus making it premature for this Court to decide whether the exercise of jurisdiction comports with Article III. (Opp. at 9-10.) That is incorrect. As this Court has noted, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case". *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *see also Bell v. Hood*, 327 U.S. 678, 682 (1946). Petitioners' arguments before the district court (*see* Opp. at 10 n.6) go to the validity of respondents' claims that petitioners' actions violated international law, and therefore should not properly be viewed as challenges to statutory subject-matter jurisdiction. Accordingly, they do not counsel against this Court's review of Question Four. *See Steel Co.*, 523 U.S. at 92 (noting the failure to find "a single case

Circuit sitting *en banc* can reconsider *Filartiga*, and petitioners raised and argued the question on their petition for rehearing *en banc*.[5] In any event, questions of the federal courts' subject-matter jurisdiction are properly raised at any time. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (subject-matter jurisdiction "must be policed by the courts on their own initiative even at the highest level").[6]

II. The Second Circuit's decision involves important legal rulings that conflict with the holdings of other circuits.

By arguing that "the Court of Appeals engaged in precisely the kind of straightforward multifactor balancing that *Piper* and *Gilbert* mandate" (Opp. at 11), respondents have exposed an important error in the Second Circuit's *forum non conveniens* ruling. Under *Piper* and *Gilbert*, the *district court*

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in which this Court has . . . call[ed] the existence of a cause of action 'jurisdictional,' and decide[d] that question before resolving a dispute concerning the existence of an Article III case or controversy").

[5] The Second Circuit's refusal to reconsider *Filartiga* makes review by this Court particularly important. The Second Circuit is likely to be the locus of many ATS cases involving alien defendants, because this case allows foreign corporations listed on the New York Stock Exchange to be subjected to personal jurisdiction in New York and foreign dignitaries regularly enter New York to visit the United Nations, *see, e.g.*, *Kadic*, 70 F.3d at 237 (defendant served while visiting United Nations); Graham Rayman, *Zimbabwe Leader Sued*, Newsday, Sept. 9, 2000, at A3 (same); Edward Wong, *Chinese Leader Sued in New York Over Deaths Stemming From Tiananmen Crackdown*, N.Y. Times, Sept. 1, 2000, at A6 (same).

[6] Respondents' RICO claim does not, as they assert, provide two "alternative statutory bases for subject-matter jurisdiction" (Opp. at 9). A plaintiff cannot, through the inclusion of a "wholly insubstantial" claim "made solely for the purpose of obtaining jurisdiction", manufacture federal court jurisdiction where it is otherwise absent. *Steel Co.*, 523 U.S. at 89. The contention that RICO can be applied to the exclusively Nigerian conduct and effects alleged in the Amended Complaint is "so insubstantial, implausible, . . . [and] completely devoid of merit as not to involve a federal controversy". *Id.* Thus, if the Court were to grant the writ and conclude that respondents' international law claims do not provide a basis for Article III federal-question jurisdiction, the federal courts would lack jurisdiction (under 28 U.S.C. § 1331 or otherwise) over the entire action.

must perform that balancing, which the court of appeals may reverse only for abuse of discretion. (Pet. at 14.) Petitioners seek review not of the *Gilbert* balance struck by the district court,[7] but of the Second Circuit's erroneous legal justifications for upsetting the balance struck by the district court.[8]

As set forth in the Petition, these *legal* issues are twofold. *First*, the Second Circuit's holding directly conflicts with the holding in *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088 (9th Cir. 1998).[9] These cases cannot be reconciled by pointing, as respondents do (Opp. at 13 n.9), to the adequacy of the alternative forum; the *Piper* presumption involves an inquiry that is separate from that of the adequacy of the alternative forum. (*See* Pet. at 17.)[10] *Second*, the Second

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[7] The district court determined that the *Gilbert* factors balanced in favor of dismissal. (App. B-10 to B-11.) The Second Circuit's conclusion that in "[its] view", the *Gilbert* factors do not warrant dismissal (Opp. at 14 n.11), simply shows that the Second Circuit improperly second-guessed the district court. Respondents repeat this error in arguing that petitioners "failed to demonstrate the inconvenience of defending" in New York (Opp. at 12 n.7), "failed to demonstrate substantial interests favoring their preferred alternative forum" (Opp. at 13 n.9), "failed to establish that the *Gilbert* private and public factors balanced in favor of dismissal" (Opp. at 13 n.10), and "failed to do their job below" (Opp. at 15).

[8] Respondents' accusation that petitioners made a "serious misrepresentation" in stating that the Second Circuit concluded that the Torture Victim Protection Act and plaintiffs' U. S. residence outweigh the factors favoring trial in England (Opp. at 14) is wrong; respondents themselves quote language demonstrating that the Second Circuit did precisely that. (Opp. at 14 n.11.)

[9] In *Gemini Capital Group*, the Ninth Circuit, affirming dismissal in favor of trial in a foreign forum, held that residents of California filing suit in Hawaii were not entitled to the strong "home forum" presumption under *Piper*. The Second Circuit, reversing the district court's dismissal in favor of trial in England, granted that strong presumption to non-New York residents of the United States who filed suit in New York.

[10] Respondents' argument that Nigeria is an inadequate forum (Opp. at 13 n.9) misses the point because the district court dismissed this case in favor of trial in *England* (Pet. at 9). We note also that since the filing of this lawsuit, civilian rule in Nigeria has been reestablished, and a governmental

Circuit's holding that there is a special rule favoring receptivity of ATS cases (thereby disfavoring *forum non conveniens* dismissals) conflicts with the rule in other circuits as to the effect of a federal statute on a *forum non conveniens* inquiry. (*See* Pet. at 15.)[11] Accordingly, this Court should review the Second Circuit's decision on *forum non conveniens*.[12]

Similarly, there is nothing at all "routine" (Opp. at 15) about the Second Circuit's personal jurisdiction analysis. Respondents concede that the investor relations office exists *solely* to "promote petitioners' good relationships with existing

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entity, the Oputa Human Rights panel, has begun investigating the abuses of the prior regime. *See* U.S. Department of State, 2000 Country Reports on Human Rights Practices, Nigeria § 4 (Feb. 2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/af/index.cfm?docid=700. Indeed, respondent Ken Wiwa has filed a petition with the Oputa panel relating to the events giving rise to this lawsuit. *See id.* § 1(e).

[11] Respondents do not address most of the cases cited in the Petition. (*See* Pet. at 15-17.) Moreover, they themselves describe *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), as "clearly not[ing]" that *forum non conveniens* is "fully available" in ATS cases. (Opp. at 13 n.10.) In this case, by contrast, after having previously reserved judgment on whether the use of *forum non conveniens* in ATS cases would "frustrate Congress's intent to provide a federal forum", *see Jota v. Texaco Inc.*, 157 F.3d 153, 159 (2d Cir. 1998), the Second Circuit limited use of the doctrine on the grounds that ATS cases are "our business" and there is "a policy favoring receptivity by our courts to such suits". (App. A-28, A-30.) Respondents err in asserting (Opp. at 14) that petitioners were "disingenuous[]" in observing that the Second Circuit relied on this policy in reaching its decision because the Second Circuit said it would have reached the same result in any event. The Petition itself makes clear (at 11-12) that the Second Circuit invoked alternative legal grounds for its ruling, but far from "disingenuously" ignoring the alternative ground, the Petition seeks review of both grounds.

[12] Respondents' assertion (Opp. at 12 n.8) that the Second Circuit should resolve any conflict between this case and *DiRienzo v. Philip Services Corp.*, 232 F.3d 49 (2d Cir. 2000), is a non sequitur. The two cases are consistent. Petitioners cited the *DiRienzo* dissent to show that the circuit split identified by petitioners has been recognized by at least one member of the Second Circuit, who disagrees with the Second Circuit's rule (and has suggested that review by this Court is desirable). (*See* Pet. at 19-20.)

or potential U.S. investors and to ensure ready access to U.S. capital markets". (Opp. at 17.) These are "NYSE-related" activities (*see* Br. of N.Y. Stock Exch., Inc. as Amicus Curiae ("NYSE Br.") at 10-11), and in any event do not constitute the sale, solicitation or promotion of products or services (*see* Pet. at 21-22). The Second Circuit's decision that such activities are sufficient under the Due Process Clause to support the assertion of general jurisdiction, an issue of law that has broad and significant consequences (*see* NYSE Br. at 4-8, 11-12), conflicts with the decisions of other circuit courts and state courts of last resort (*see* Pet. at 23).[13]

III. *Filartiga* involves an important ruling of law that conflicts with long-standing precedent of this Court.

The Court should review the Second Circuit's holding in *Filartiga* that a dispute between aliens involving alleged violations of international law "arises under the Laws of the United States" within the meaning of Article III. (Pet. at 5.)[14]

Apparently recognizing that *Filartiga* cannot be justified on its own terms, respondents argue that the ATS is an exercise of Congress's Article I power to create a cause of action that defines and punishes offenses against the law of nations. (Opp. at 22-24.) However, the Second Circuit expressly declined to "treat[]" the ATS "as an exercise of Congress's power to define offenses against the law of nations". *Filartiga*, 630 F.2d at 887. This is undoubtedly correct, for the text and historical context of the ATS demonstrate conclusively that it is a jurisdictional statute that does not create any substantive

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[13] Respondents' only effort to distinguish these conflicting cases is to say, *ipse dixit*, that "all involved isolated or occasional activity". (Opp. at 17 n.14.) That is simply incorrect, as the cases themselves make clear. (*See* Pet. at 23-24; Br. for U.S. Council for Int'l Bus. as Amicus Curiae at 19-20.)

[14] Respondents' assertion that the ATS "means just what it says" in granting statutory jurisdiction over claims by aliens for torts in violation of international law (Opp. at 20) misses the point. Petitioners argue not that the Second Circuit misapplied the ATS, but that the exercise of ATS jurisdiction in cases between aliens (*i.e.*, where there is no diversity jurisdiction) is inconsistent with Article III. (*See* Pet. at 5-6, 24-25.)

rights.[15] As such, the ATS does not give rise to statutory or constitutional federal-question jurisdiction. (*See* Pet. at 5 n.1.)[16]

The Second Circuit in *Filartiga* instead justified its assertion of Article III jurisdiction on the basis that common law claims for violations of international law arise under federal law. (*See* Pet. at 24.) *That* directly conflicts with an unbroken line of precedent of this Court. (*See* Pet. at 25.) Contrary to respondents' argument (Opp. at 22 n.21), the cases cited in the Petition do not support the principle that international law raises a federal question giving rise to subject-matter jurisdiction. In *Ker v. Illinois*, this Court held that it had "no right to review" a claimed violation of "the law of nations" because a federal question was not presented. 119 U.S. 436, 444 (1886). In *Huntington v. Attrill*, this Court explained that it would determine issues of international law in connection with a question under the Full Faith and Credit Clause (just as it will determine issues of contract law in connection with questions under the Contracts Clause), but emphasized that questions of international law are not federal law and the Constitution has "not authorized" them "to be reviewed by this [C]ourt". 146 U.S. 657, 683-84 (1892). And in both *Oliver American Trading Co. v. Mexico* and *New York Life Insurance Co. v. Hendren*, this Court held that it did not have federal-

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[15] The ATS is phrased in terms of "jurisdiction", and was originally phrased in terms of "cognizance" (*see* Pet. at 5 n.1), which means "jurisdiction", *see FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Moreover, the ATS was enacted as part of the Judiciary Act of 1789 (*see* Pet. at 5 n.1), and was codified as part of title 28 of the United States Code, entitled "Judiciary and Judicial Procedure". Such a statute is plainly not an exercise of Congress's power to define and punish offenses against the law of nations. *Cf. The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 451-52 (1851) (holding that "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's commerce power).

[16] Thus, this case is *not* about whether Congress can create a private right of action pursuant to its define and punish power. It assuredly can, as the Petition pointed out. (Pet. at 5 n.2.) But it did not do so in the ATS.

question jurisdiction to review defenses premised upon international law. 264 U.S. 440, 442-43 (1924); 92 U.S. 286, 286-87 (1875). Thus, the practice that respondents assert has prevailed for more than 210 years (Opp. at 22), has actually prevailed for only the twenty-one years since *Filartiga* disrupted nearly two centuries of settled practice. *See also* 5 Op. Att'y Gen. 691, 692 (1802) ("doubt[ing] the competency of the federal courts" to hear "an aggravated violation of the law of nations" in the absence of a congressional "statute recognizing the offence").[17]

Respondents' argument that claims for violations of international law should be considered part of the limited federal common law that is federal law in the Article III sense (Opp. at 25 & n.25) is also wrong. The Petition (at 26 n.17, 27 n.18) explains briefly why this is so, and the issue would, of course, be more fully argued in the merits briefs. What is critical at this stage is that respondents cannot point to any holding of this Court to support their contention, which is not surprising given that their contention directly conflicts with

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[17] The irreconcilable conflict between *Filartiga* and this Court's precedents makes this case appropriate for *certiorari* review even absent a conflict among the circuits. Moreover, respondents are wrong in arguing (Opp. at 22 n.20) that the separate opinions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), do not conflict with *Filartiga*. (*See* Pet. at 28-29.) Respondents do not dispute that Judge Robb called *Filartiga* "fundamentally at odds with . . . the role of United States courts", 726 F.2d at 826 n.5 (Robb, J., concurring), and their claim that Judge Bork "took pains to point out" that his opinion did not conflict with *Filartiga* (Opp. at 22 n.20), is wrong. Judge Bork noted that "not all" his analysis "would apply to deny a cause of action to the plaintiffs in *Filartiga*", but concluded that *Filartiga* is a "fundamentally wrong" decision that "must be rejected for several reasons", and attacked its rationale as a conclusion he "cannot accept". 726 F.2d at 801, 810-11, 820 (Bork, J., concurring). Respondents' citation to this Court's denials of *certiorari* in *Tel-Oren* and other ATS cases (Opp. at 21 n.19) does not help them because, as respondents themselves recognize (Opp. at 8 n.4), denial of *certiorari* imports no expression of opinion upon the merits. In any event, the petitions in those cases did not address the inconsistency between *Filartiga* and this Court's precedents.

multiple decisions of this Court.[18] It is the prerogative of this Court—not the Second Circuit, "the considered view of the American Law Institute[]" or "a long list of experts" (Opp. at 26)—to decide whether more recent jurisprudential developments warrant a departure from the Court's settled precedents. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

CONCLUSION

For the reasons stated herein and in the Petition, the petition for a Writ of Certiorari should be granted.

March 5, 2001

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[18] The cases cited by respondents (Opp. at 25 n.25) do not show that international law provides a basis for federal-question jurisdiction. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 502 (1988), which has nothing to do with international law, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 (1964), which actually supports petitioners' argument (*see* Pet. at 26 n.17), and *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 615 (1983), were all in federal court on diversity jurisdiction. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981), was an antitrust case, and *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972), involved a dispute between states involving the pollution of interstate waterways.

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No. 00-1168

IN THE

Supreme Court of the United States

ROYAL DUTCH PETROLEUM COMPANY AND THE "SHELL" TRANSPORT AND TRADING COMPANY, P.L.C.,

Petitioners,

v.

KEN WIWA, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF HIS DECEASED FATHER, KEN SARO-WIWA, OWENS WIWA, BLESSING KPUINEN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HER HUSBAND, JOHN KPUINEN, AND JANE DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF NEW YORK STOCK EXCHANGE, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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February 21, 2001

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BRIEF OF NEW YORK STOCK EXCHANGE, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

New York Stock Exchange, Inc. ("NYSE") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.[1] NYSE's comments are limited to the

[1] The parties have consented to NYSE's participation as amicus curiae, and letters of consent have been filed with the Clerk of the Court. *(footnote continued. . .)*

third question presented by the petition – whether general personal jurisdiction may be asserted over non-U.S. corporations whose only contacts with the forum consist of activities directed at facilitating relations with investors in the corporations' publicly traded securities. NYSE expresses no views on the other questions presented.

INTEREST OF AMICUS CURIAE

NYSE is a corporation organized under the New York Not-For-Profit Corporation Law. It is registered as a national securities exchange with the Securities and Exchange Commission, and is a self-regulatory organization within the meaning of section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(26). NYSE's principal activity is the operation and regulation of an auction market for the purchase and sale of equity securities listed for trading on NYSE. Among its various requirements, the Exchange Act obligates NYSE to adopt and enforce rules that are designed "to remove impediments to and perfect the mechanism of a free and open market. . . and, in general, to protect investors and the public interest." 15 U.S.C. § 78f(b)(5) (describing obligations of a national securities exchange).

As of February 6, 2001, securities of 432 non-U.S. companies from 51 countries, including both petitioners in this case, were listed for trading on NYSE. NYSE competes with other securities markets in the United States and abroad for companies, including non-U.S. companies, to list their securities for trading.

No counsel for any of the parties authored this brief, in whole or in part, and no one other than NYSE made a monetary contribution to its preparation or submission.

The decision of the United States Court of Appeals for the Second Circuit in this case, holding that a non-U.S. corporation may be subject to general personal jurisdiction based on the presence in New York of an investor relations office, may cause non-U.S. companies to refrain from performing investor relations functions in the United States, creating an informational disadvantage for their shareholders in the United States and reducing the efficiency of the market for their shares in this country. The decision even may cause some non-U.S. companies to rethink the decision to list their shares in the United States altogether. Such an effect potentially could weaken the ability of U.S. securities markets to compete for non-U.S. listings, and effectively deprive U.S. investors of the legal and other benefits of investing in such companies on U.S. markets.

SUMMARY OF ARGUMENT

Tremendous growth in trading volume in recent years, along with the globalization of markets, have made an effective investor relations program an integral aspect of stock exchange listing. Investor relations professionals in the United States are a critical point of contact between many non-U.S. issuers, the stock markets, and the investing public, facilitating the prompt and efficient transfer of information that can have a significant effect on the market for the companies' shares. By facilitating the timely dissemination of information to the investing public, performance of investor relations functions in the United States assists in the operation of an efficient market for a company's securities.

It long has been recognized that a company is not doing business in New York merely by taking ancillary steps in support of an NYSE listing. The Court of Appeals departed from this long-standing precedent in concluding that the presence of petitioners' investor relations staff in New York constitutes "doing business" in the state for purposes of gen-

eral personal jurisdiction. In today's global economy, where an increasing percentage of people invest in corporate securities, investor relations activities play an important role in protecting the interests of investors. They therefore should be considered as a matter of law to be ancillary to the listing of securities of non-U.S. companies.

ARGUMENT

I. LISTED COMPANIES' INVESTOR RELATIONS PROGRAMS SERVE AN IMPORTANT PUBLIC INTEREST BY FOSTERING AN EFFICIENT MARKETPLACE FOR EQUITY SECURITIES

In recent years, the securities markets in the United States have undergone dramatic changes. Perhaps the most significant has been a substantial increase in the number of individuals buying and selling stocks, many through low-cost online brokerage firms.[2] As a result, more people in the United States than ever before are investing a portion of their savings directly in stocks. For many U.S. investors, the purchase of shares of non-U.S. companies is a way to diversify their stock holdings and spread their risk exposure across geographic sectors.[3] In addition, globalization often has removed the significance of domicile in determining which are the leading companies in a particular industry. Participation in the growth of the leading companies in many sectors to-

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[2] *See* New York Stock Exchange, Inc., *Shareownership 2000*, at 11 (*available at* http://www.nyse.com/marketinfo/marketinfo.html) (reporting statistical data about holdings of securities in U.S. and non-U.S. companies by U.S. investors based on the 1998 Survey of Consumer Finances, a household survey conducted under the auspices of the Federal Reserve Board).

[3] *See id.* at 40. In 1998, almost 3.7 million individuals in the United States directly held shares of non-U.S. companies. *Id.* at 45. When holders of mutual funds are added, the number of U.S. investors in securities of non-U.S. companies rises to 37.6 million. *Id.* at 48.

day requires many U.S. investors to transcend geographic borders.

A few statistics about the operations of NYSE and share ownership among individuals in the United States illustrate the effects of these changes on the securities markets. Between 1996 and 2000, the average daily trading volume on NYSE increased from about 400 million shares per day to over 1 billion. At the end of 2000, shares of 2,862 companies were listed on NYSE, representing $17 trillion in global market capitalization. Perhaps most significantly, the number of individual U.S. investors who directly own stocks rose from 27.4 million in 1995 to 33.8 million in 1998.[4]

Changes to NYSE's non-U.S. stock listings have been equally dramatic. As of February 6, 2001, securities of 432 non-U.S. companies were listed for trading on NYSE, up from just 96 companies in 1990. In 2000 alone, NYSE added 61 non-U.S. company listings, and NYSE trading volume in non-U.S. securities averaged 100.2 million shares per day, an increase of 53 percent over the 1999 average. The trading of securities of non-U.S. issuers today represents approximately 10 percent of the total average trading volume on NYSE.

In addition to increases in the number of individual investors and diversification of their portfolios with foreign securities, there have been marked changes in the ways investors educate themselves about the stocks they buy and sell. The proliferation of sources for financial news – especially the internet and cable television – has substantially increased the speed at which information affecting investment decisions is disseminated to the investing public and the speed at which such information is reflected in stock prices.

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[4] *See id.* at 15.

In the current market environment, it has become increasingly important for listed companies to maintain an effective investor relations program. Investor relations professionals serve an important role in conveying relevant information to individual and institutional shareholders, securities analysts, and the U.S. securities markets, thereby helping to maximize the efficiency of the market for a company's securities. Investor relations offices also perform the function of communicating investor expectations, interests, and concerns to company management. Investor relations functions thus now have become an integral part of many corporations' listings on NYSE and other U.S. markets.

NYSE has compiled a checklist of investor relations "best practices" for successful listing drawn from the recommendations of leading securities industry sources, including the National Investor Relations Institute, a professional association of corporate officers and investor relations consultants. Among the steps NYSE recommends its listed companies take are:

- Providing U.S. investors with easy access to information, such as company press releases;
- Simultaneously releasing material news in the U.S. and the home country;
- Conducting analyst conference calls with a U.S. dial-in option;
- Implementing appropriate measures to ensure the accuracy of company information provided by commercial services; and
- Conducting regular surveys of market participants to understand market trends and investor expectations.

NYSE and securities industry trade groups affirmatively recommend to non-U.S. listed companies that, as part of their

investor relations program, they have a U.S. contact person for investor inquiries.

NYSE estimates that at least half of its 432 non-U.S. listed companies maintain an investor relations office in the United States, or retain a service here to perform those functions, and the trend toward having an investor relations presence in the United States is accelerating. Many non-U.S. companies that list their shares on NYSE maintain an investor relations function in New York City to have that function in close proximity to investors, financial analysts, and financial news media located there.

An investor relations presence contributes to an even playing field for all investors by neutralizing the inherent informational disadvantage a U.S. investor otherwise has relative to investors in the issuer's home market. A listed company's investor relations staff in New York (or elsewhere in the United States) also serves as an important point of first contact for NYSE staff in the event there is breaking news that could have a significant effect on share prices or unusual trading activity in the company's shares. In modern financial markets, events unfold rapidly, frequently necessitating immediate communications between NYSE staff and informed representatives of listed companies.

In this regard, consider NYSE's Timely Alert policy – a communications program with which all NYSE-listed companies must comply. The Timely Alert policy seeks to maintain a level playing field for all investors by trying to ensure the investing public equal access to significant market-related information. Under the Timely Alert policy, a listed company must notify a designated NYSE staff member ten minutes before issuing a press release containing significant company information during trading hours. The purpose of this policy is to give NYSE an opportunity to assess whether trading in the company's securities should be halted temporarily to allow current and potential shareholders time

to assess the news and make an informed investment decision. Similarly, the Timely Alert policy requires a listed company to issue a press release within 30 minutes of being notified by NYSE of unusual trading activity in the company's stock, stating whether or not it knows of any reason for the unusual trading.

Even with the benefits of modern telecommunications technologies, the performance of these time-critical tasks across multiple time zones is difficult, and for that reason many listed companies (both U.S. and non-U.S.) locate their investor relations function in New York City. To illustrate the complexity associated with non-U.S. companies, imagine that unusual trading in the shares of such a company occurs at 2:00 P.M. in New York. With non-U.S. listed companies located in 51 countries, it might be well into the night at the company's headquarters, and NYSE staff may be unable to locate a knowledgeable contact person. As a result, NYSE might decide to halt trading for the rest of the day. If there is a knowledgeable investor relations staff person in New York, however, NYSE may be able to determine quickly the reason for the unusual trading activity, permitting the resumption of trading and the opportunity for all investors, large and small, to buy or sell the company's securities before the close of the trading day.

II. LISTING ON THE NYSE AND ACTIVITIES ANCILLARY THERETO DO NOT CONSTITUTE "DOING BUSINESS"

In a long line of precedent, state and federal courts in New York consistently have held that the listing of securities for trading on a stock exchange, and activities ancillary to such listing, do not constitute "doing business" and therefore are insufficient, without more, to subject a corporation to general personal jurisdiction under New York law. *See, e.g.*, *Freeman v. Bean*, 266 N.Y. 657 (1935) (holding that retention of transfer agent and registrar for stock in New York

City does not constitute transacting business in New York); *Sunrise Lumber Co. v. Homer D. Biery Lumber Co.*, 195 A.D. 170, 185 N.Y.S. 711 (1921) ("There is scarcely a considerable corporation anywhere in the United States which does not attempt to sell its stock and bonds through Wall Street houses. Such selling is not a doing of business by the corporation."); *Grossman v. Sapphire Petroleums Ltd.*, 195 N.Y.S.2d 851 (Sup. Ct. 1959) ("the fact that securities of a foreign corporation are traded on a stock exchange within the state does not constitute 'doing business' within the state for the purpose of conferring jurisdiction"); *Cotugno v. Union Pacific R.R.*, 177 N.Y.S.2d 126 (Sup. Ct. 1958) (maintaining transfer office as required by NYSE does not constitute doing business); *Robbins v. Ring*, 166 N.Y.S.2d 483 (Sup. Ct. 1957) (listing of shares on American Stock Exchange and retention of stock transfer agent in New York City does not constitute doing business); *Joseph Walker & Sons v. Lehigh Coal & Navigation Co.*, 167 N.Y.S.2d 632 (Sup. Ct. 1957) (sale of securities on NYSE, incidental maintenance of bank accounts for dividend payments, and designation of transfer agent and registrar in New York City do not constitute doing business); *Industrial Acoustics Co. v. Energy Services, Inc.*, No. 93 Civ. 2865 (MBM), 1994 U.S. Dist. LEXIS 4470 (S.D.N.Y. Apr. 7, 1994) (listing of stock on NYSE and maintenance of transfer agent and bank account in New York insufficient to constitute doing business); *Celi v. Canadian Occidental Petroleum Ltd.*, 804 F. Supp. 465 (E.D.N.Y. 1992) (listing of stock on American Stock Exchange does not constitute doing business); *Clews v. Woodstock Iron Co.*, 44 F. 31 (S.D.N.Y. 1890) (listing of bonds on NYSE does not constitute doing business).

One district court recently stated, in a similar context, that this line of cases is "particularly sensible" because, "if participation in New York's international financial markets alone could constitute 'doing business,' personal jurisdiction would be almost limitless and would no doubt raise consid-

erable constitutional concerns." *Feldman v. Silverleaf Resorts, Inc.*, No. 98 Civ. 4566, 2000 U.S. Dist. LEXIS 1005, at *13 (E.D.N.Y. January 31, 2000).

It thus long has been the rule that "a company is not 'doing business' in New York merely by taking ancillary steps in support of its listing on a New York exchange." Pet., App. A-14. The Court of Appeals concluded, however, that petitioners' investor relations activities resulted "not from legal or logistical requirements incumbent upon corporations that list their shares on the New York Stock Exchange, but from the [petitioners'] discretionary determination to invest substantial sums of money in cultivating their relationship with the New York capital markets." *Id.*

In reaching this conclusion, the Court of Appeals apparently did not fully appreciate the changes that have occurred in the securities markets in recent years and the important contribution investor relations professionals make to the efficient operation of those markets. Thus, while an investor relations program may or may not have been considered ancillary to listing on NYSE or another U.S. exchange 100, 50, or even 20 years ago, today it is very much so.

To be sure, an investor relations program with an office in New York is not a regulatory prerequisite to listing a company's securities on a U.S. stock exchange. The practical reality, however, is that trading of corporate securities in today's world requires considerable contact, on short notice, between U.S. securities markets and issuers. The purpose of this contact is to protect the myriad individual and institutional investors who buy and sell securities of non-U.S. listed companies on NYSE and other U.S. markets every day.

Investor relations professionals located in New York or elsewhere in the United States play a key role in maximizing the efficiency of the market for securities of non-U.S. issuers, and are an important aspect of the "best practices" recommended by NYSE to its non-U.S. listed companies.

Maintaining such an investor relations program to support an NYSE or other U.S. market listing inures to the benefit of all U.S. investors in the company's securities. Accordingly, the exercise of general personal jurisdiction over a non-U.S. corporation based only on the listing of its securities on a U.S. exchange and the performance of investor relations functions in New York conflicts with long-standing precedent and is inappropriate as a matter of law and policy.

III. THE COURT OF APPEALS' DECISION MAY ADVERSELY AFFECT THE EFFICIENCY OF THE U.S. MARKET FOR THE SECURITIES OF NON-U.S. COMPANIES AND THE ABILITY OF THE U.S. SECURITIES MARKETS TO COMPETE WITH NON-U.S. MARKETS FOR FOREIGN LISTINGS

The decision below has implications far beyond whether the petitioners will be required to defend a single lawsuit in federal district court in New York, making it worthy of certiorari. If maintaining an NYSE listing and an investor relations staff in New York is, as the Court of Appeals concluded, sufficient to establish general personal jurisdiction over a non-U.S. corporation, some non-U.S. companies may decide against locating or keeping investor relations functions in New York or, for that matter, anywhere in the United States. The unfortunate result of such a development would be a securities market in which information about those companies is less timely, impairing the efficiency of the market for U.S. investors.

Moreover, some non-U.S. companies may decide not to list (or to de-list) their securities on NYSE or other U.S. markets out of concern that they could be subject to the jurisdiction of state and federal courts in the United States for all manner of claims. In NYSE's experience, the risk and potential cost of litigation in the United States is one factor that non-U.S. companies typically evaluate carefully before

deciding to list their shares on a U.S. stock market. The Court of Appeals' decision in this case therefore may diminish the competitiveness of NYSE and other U.S. markets as they vie, along with other markets around the world, for non-U.S. company listings. If that happens, many investors in this country would lose the opportunity to diversify and invest in leading global companies that flows from the trading of non-U.S. company stocks on U.S. markets.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari on the third question presented by the petition.

Respectfully submitted,

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